5. The defendant has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several States and thereby has attempted to monopolize and has monopolized and has combined and conspired with others to monopolize trade and commerce among the several States and, when so engaged in said commerce and as a part of said conspiracy and in carrying the said conspiracy out, has in the course thereof made leases and contracts on the condition, agreement and understanding that the lessee or licensee shall not use or deal in the goods of competitors of the defendant and where the effect of such lease and contract and agreement and understanding was to tend to create a monopoly in a line of commerce in violation of Title 15, chapter 1, sections 1 and 2, of the Code of Laws of the United States in the respects hereinafter set forth, and solely by the illegal conjunction of said acts has injured the plaintiff in its business and property in the manner and to the extent hereinafter set forth.

6. The plaintiff in the year 1926 was engaged in the manufacture, distribution in interstate commerce, and sale in interstate commerce, of tubes known as Raytheon rectifying tubes for use with radio receiving sets. The plaintiff had developed this tube through periods of prior experimentation and had expended large sums of money therein and in introducing this tube into use in interstate commerce by manufacturers of radio receiving sets and by dealers in such sets and had created and then possessed a large and valuable good will in this interstate commerce and then had a large and profitable established interstate business [fol. 5] therein, so that for the year 1926 the net profits of said business actually realized and received were $454,935. Said business then had an established prospect of large increase and said business and the good will thereof was of a present value of exceeding three million dollars.

7. Prior to the year 1926 the defendant was engaged in interstate and foreign commerce in divers kinds of radio apparatus and in radio communication. When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign com-

merce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition.

8. At this time there were many devices either necessary or desirable for the successful operation of radio receiving apparatus which were the subject of Letters Patent of the United States, owned by independent individuals, firms and corporations, and these were independent sources of supply for radio apparatus dealers and manufacturers who could obtain by negotiation with these independent competitors the patented articles and leases and licenses under the patents to manufacture and sell and use such articles.

9. For the purpose aforesaid and pursuant to the plan and conspiracy aforesaid the defendant conspired with several of these independent owners of Letters Patent, and of devices for radio receiving apparatus, to acquire as many as possible of these patents or exclusive licenses thereunder. Many of these patents were for competitive devices. Some of these licenses were absolutely exclusive, and others were exclusive with limited exceptions which would not interfere in actual conduct of business with the defendant's monopoly.

10. The defendant carried out this conspiracy and obtained this monopoly in the manner planned, and so completely that by the year 1927 it was practically impossible [fol. 6] for manufacturers or dealers in commercially vendable radio receiving sets of the standard demanded by the purchasing public to manufacture or to sell such a set without the consent of the defendant with respect both to devices for which the defendant held the patent and to devices for which the defendant held no patent.

11. The defendant has full knowledge of the various conveyances, agreements, leases, licenses, understandings and methods whereby the defendant has accomplished this monopoly, and the plaintiff has not first-hand knowledge of any of them, but has reliable information as to many of them. The plaintiff abstains from setting them forth in this declaration, because such allegations would involve the names of other persons, firms and corporations not parties to this suit.

12. By the year 1927 the defendant had so far perfected this unlawful monopoly in interstate commerce in radio

receiving set apparatus that wholly by reason thereof it exerted by its illegal acts an illegal duress upon all those engaged in this branch of interstate commerce so that they were compelled involuntarily to deal with the defendant upon such terms as the defendant dictated or to cease business.

13. In the progress of this industry up to the beginning of the year 1927, it was the regular course of business for manufacturers of radio receiving sets to manufacture them and to sell them to jobbers and to dealers without tubes and for the jobbers or the dealers to procure tubes in the open market with which to equip them on or after the retail sale of them.

14. Radio receiving sets in ordinary course outlast the tubes first supplied with them. There is a recurring business in the supply of tubes to take the place of those worn out in use. It is the ordinary course of this business that the owner of a radio receiving set seeks replacement tubes of the same kind as those supplied with the set originally. As a result of this, control of the kind of tubes originally installed in the set or initially supplied for its use is in practice a control of the entire replacement business.

15. At the beginning of the year 1927 the defendant had [fol. 7] no legitimate control over the trade and commerce either intrastate, interstate, or foreign in radio receiving set tubes; but it was competing in the interstate and foreign commerce for the radio tube business and was in competition in that interstate and foreign commerce with the plaintiff.

16. By the beginning of 1927 the plaintiff had produced in the Raytheon rectifying tube the best rectifying tube for a radio receiving set that has been manufactured up to the present time.

17. By the beginning of 1927 the plaintiff was doing approximately eighty-five percent of the business in rectifier tubes of the entire United States. The plaintiff was selling and shipping these tubes in interstate commerce throughout the United States. The plaintiff had a large interstate trade with radio set manufacturers, jobbers, dealers and laboratory workers.

18. The defendant, pursuant to the plan and conspiracy hereinbefore stated, and as a part thereof and in order to carry it out, determined to restrain, suppress and destroy the competition of the plaintiff and of all other manufacturers of radio receiving set tubes and of all dealers therein in interstate and foreign commerce, and to do this by contract, combination and conspiracy and thereby to obtain a monopoly of this interstate and foreign commerce.

19. Pursuant to this conspiracy, and as one of the means of putting it into effect, the defendant required all persons, firms and corporations in order to obtain the right to use certain radio receiving set devices on which the defendant held Letters Patent, in the manufacture and sale of radio receiving sets and which were necessary therefor, to enter into the form of contract with the defendant hereinafter set forth.

20. The defendant put this step in this conspiracy into effect in the summer of 1927.

21. The defendant did not at this time hold any Letters Patent entitling it to any monopoly in radio tubes and has not since acquired any such patents.

22. In putting this step in this conspiracy into effect, the defendant combined and conspired with the holders of [fol. 8] other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers, to issue a standard form of license agreement to manufacturers of radio sets purporting to give to the licensee a non-exclusive license to manufacture at its factory at a particular location and to sell radio apparatus for defined purposes under the Letters Patent owned by the licensors with certain stated exceptions.

23. This form of license contained a provision as follows:

9. Nothing herein contained shall be construed as conveying any licenses expressly or by implication, estoppel or otherwise to manufacture, use or sell vacuum tubes, except to use and sell the vacuum tubes purchased from the Radio Corporation as provided herein. The Radio Corporation hereby agrees to sell to the Licensee and the Licensee hereby agrees to purchase from the Radio Cor-

poration the number, and only the number, of vacuum tubes to be used as parts of the circuits licensed hereunder and required to make initially operative the apparatus licensed under this Agreement, such tubes to be sold by the Radio Corporation to the Licensee at the terms and at the prices at which they are then being sold by the Radio Corporation to other manufacturers of radio sets buying in like quantities for the same purpose. But the sale of such tubes by the Radio Corporation to the Licensee shall not be construed as granting any licenses except the right to sell such tubes for use in, and to use them in, the apparatus made and sold hereunder.

24. The state of the industry at this time was such, and the habits of the purchasing public were such, that this clause in its effect gave the defendant an illegal monopoly of the interstate and foreign commerce in tubes for radio receiving sets throughout the United States, because of the facts hereinbefore and hereinafter stated.

25. Radio set manufacturers could not manufacture radio receiving sets of the standard required by the purchasing public without incorporating into such sets devices other than tubes described in Letters Patent owned or controlled by the defendant.

[fol. 9] 26. This patent control by the defendant, and the apparent requirements of said clause 9, were known both to manufacturers and to dealers in radio receiving sets throughout the United States.

27. The great majority in volume of manufacturers and dealers in radio receiving sets throughout the United States did not dare to manufacture or to handle radio receiving sets of the standard required by the buying public in defiance of the provisions of these patents, without license from the defendant, and without compliance with the apparent requirements of said clause 9.

28. As a result of this, by these means the defendant completed and carried out its said plan and conspiracy and thereby restrained, suppressed and destroyed the existing competition in the manufacture of and interstate and foreign commerce in receiving set tubes.

29. The set manufacturers, to avoid the danger of unfounded suits by the defendant, and for no other reason, ceased to purchase tubes from the plaintiff and other manufacturers for initial installation in the sets manufactured by them.

30. For the same reason and no other, experimentalists in radio receiving set manufacture and in tubes therefor ceased to purchase tubes from the plaintiff and other tube manufacturers because of the belief which the defendant had created that such experimentation was useless because the commercial field for such tubes and sets equipped with them had been destroyed by the defendant.

31. The interstate and foreign commerce in replacement business in tubes was destroyed because it was the practice of radio receiving set purchasers to seek, as replacements of worn out tubes, tubes of the same kind as those supplied for the initial installation. The actual conditions in the industry and in the interstate and foreign commerce were such that a licensee would not under such circumstances invite litigation when immunity therefrom might be had by equipping every receiving set made by him, whether believed to be within the scope of the patents of the licensor or not, with the tubes of the defendant.

32. During the year 1927 as a part of the conspiracy aforesaid, and as a step in carrying it out, the defendant issued about twenty-five licenses as above described, all [fol. 10] containing the illegal clause aforesaid. These were all accepted and executed by the licensees and thereby the defendant, pursuant to and as a part of its plan and conspiracy as aforesaid, made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several states and with foreign nations, and combined and conspired with them to monopolize the commerce among the several states and with foreign nations in radio receiving set tubes, and attempted to monopolize said interstate and foreign commerce and did monopolize the same and made leases, licenses and sales and contracts for commodities for use, consumption or resale within the United States on the condition, agreement or understanding that the licensee, lessee or purchaser thereof shall not use or deal in the

radio receiving set tubes of competitors of the defendant where the effect of such lease, sale and contract for sale and such condition, agreement and understanding was tended to create a monopoly in said interstate and foreign commerce.

33. At all of said times the defendant had a place of business in the District of Massachusetts and conducted business therein and made some of said licenses therein, and the liability to the plaintiff resulting from the illegal acts aforesaid arose and has ever since remained outstanding against the defendant in the Commonwealth of Massachusetts.

34. The effect of the aforesaid illegal plan and conspiracy, and of the aforesaid illegal conduct of the defendant in carrying it out, upon the interstate and foreign commerce in tubes as aforesaid and upon that commerce of the plaintiff's was gradual during the latter part of the year 1927. By the end of 1927 said plan and conspiracy and said conduct in carrying it out had completely destroyed the profitable interstate and foreign commerce of the plaintiff and thereby, by the early part of 1928, the said tube business of the plaintiff and the property good will of the plaintiff therein had been totally destroyed at a time when it then had a present value in excess of three million dollars and thereby the plaintiff was then injured in its business and property in a sum in excess of three million dollars.

[fol. 11] 35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign commerce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.

36. With knowledge of this compulsion and relying on its effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.

37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim.

38. When the Raytheon Manufacturing Company was organized in 1928 under the laws of Delaware, in order to avoid any doubt as to the assignability of the claim against the defendant an understanding was reached that the claim should be, as between the two corporations, in beneficial interest the property of the Delaware corporation and that it should be prosecuted for the benefit of the Delaware corporation by the plaintiff.

39. At the time of the execution of the void release aforesaid the defendant agreed with the plaintiff on or about March 19, 1929, that notwithstanding the general release to the defendant, that if hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated 9 in certain license agreements and g in certain other license agreements heretofore made by the licensors with manufacturers of radio receiving apparatus (said clause 9 having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment or agreement of settlement or otherwise, then the licensee shall become entitled to assert its claim for such damages and none of the licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; [fol. 12] and if the licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement.

40. The illegal duress aforesaid rendered said limit on the amount of recovery, and the method of its payment, void.

41. In September or October, 1931, the defendant made pecuniary recognition to the extent of not less than $1,500,000 and remission of past royalties in addition to a claimant which was a group of manufacturers of radio receiving set apparatus becoming licensed by the defendant under

all or a substantial part of the patents under which a license was granted by the agreement aforesaid, which pecuniary recognition was of its claim in consequence of judgment or agreement of settlement or otherwise.

42. The injury done to this claimant by the acts of the defendant as aforesaid was much less in amount than the injury done to the plaintiff.

43. By reason of the facts aforesaid, even if the limitation imposed on recovery by said agreement were valid, the plaintiff is entitled to recover not less than $1,500,000 and the amounts of remissions of royalties as aforesaid.

44. The plaintiff by reason of the facts hereinbefore alleged hereby claims and is entitled to recover not less than $3,000,000 threefolded to not less than $9,000,000 and the costs of this suit, including a reasonable attorney's fee.

By its Attorneys, Nutter, McClennen & Fish, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 13] IN UNITED STATES DISTRICT COURT

DISCLAIMER—Filed March 5, 1932

Now the plaintiff Raytheon Manufacturing Company organized in Massachusetts and now named by change of name Raytheon, Incorporated, and Raytheon Manufacturing Company organized in Delaware, say that the defendant has objected that this action is brought to recover on claims of said two corporations. Said two corporations deny that said objection has any foundation, but nevertheless to avoid any uncertainty said Massachusetts corporation and said Delaware corporation do hereby disclaim any right to recover in this action except on that only one cause of action arising under Title 15, chapter 1, section 15, of the Code of Laws of the United States which is alleged in the declaration, which said cause of action arose to said Massachusetts corporation and wholly existed before May 28, 1928, and before the organization of said Delaware corporation and which said cause of action did on or about May 28, 1928, by understanding and agreement between said two corporations become the property of said Delaware corporation for whose benefit this action is brought

by and in the name of said Massachusetts corporation at the instance and expense of said Delaware corporation, and the judgment on which is and shall be the property of said Delaware corporation. Any cause of action against the defendant which newly may have arisen directly to said Delaware corporation since its organization on or about May 28, 1928, wholly by reason of wrongs since said date and not derived from said Massachusetts corporation, is not included in this action but is disclaimed in this action.

Raytheon, Incorporated, Plaintiff, by Laurence Allan Hall, its Treasurer, David I. Sewall, its Assistant Treasurer, E. Curtiss Mower, Jr., its Attorney.

Raytheon Manufacturing Company (of Delaware), by Laurence Allan Hall, its President, David I. Sewall, its Treasurer, E. Curtiss Mower, Jr., its Attorney.

[fol. 14] IN UNITED STATES DISTRICT COURT

SECOND COUNT OF PLAINTIFF'S DECLARATION—Filed March 22, 1932

1. The plaintiff, Raytheon Manufacturing Company, is a corporation duly organized under the laws of the Commonwealth of Massachusetts in 1922 under the name American Appliance Company, subsequently changed to Ratheon Manufacturing Company, and subsequently changed to Raytheon, Inc., and a citizen, resident and inhabitant of the Commonwealth of Massachusetts having its usual place of business at Cambridge in said Commonwealth, and incorporated also in 1928 under the laws of the State of Delaware, for the benefit of which said corporation this action is brought.

2. The defendant, Radio Corporation of America, is a corporation duly organized under the laws of the State of Delaware and is a citizen of that State and was continuously at all times hereinafter stated and now is found in the District of Massachusetts, and continuously at said times had and now has an agent therein, and at all said times continuously has transacted and now transacts business therein.

3. The plaintiff for the benefit of said Raytheon Manufacturing Company organized under the laws of the State

of Delaware brings this action to recover the sum of exceeding nine million (9,000,000) dollars as threefold damages and for the cost of suit, including a reasonable attorney's fee, for the matters and things hereinafter set forth.

4. The plaintiff has been injured in its business and property by reason of the things done by the defendant, hereinafter set forth, forbidden in the Anti-Trust Laws of the United States whereby the plaintiff has suffered damages in its business and property in a sum in excess of three million (3,000,000) dollars which the plaintiff claims to recover three fold under Title 15, chapter 1, section 15, of the Code of Laws of the United States.

5. The defendant has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several states and thereby has attempted [fol. 15] to monopolize and has monopolized and has combined and conspired with others to monopolize trade and commerce among the several states and when so engaged in said commerce and as a part of said conspiracy and in carrying the said conspiracy out has, in the course thereof, made leases and contracts on the condition, agreement and understanding that the lessee or licensee shall not use or deal in the goods of competitors of the defendant and where the effect of such lease and contract and agreement and understanding was substantially to lessen competition and to tend to create a monopoly in a line of commerce in violation of Title 15, chapter 1, section 14, of the Code of Laws of the United States in the respects hereinafter set forth and solely by the illegal conjunction of said acts has injured the plaintiff in its business and property in the manner and to the extent hereinafter set forth.

6. The plaintiff in the year 1926 was engaged in the manufacture, distribution in interstate commerce and sale in interstate commerce, of tubes known as Raytheon rectifying tubes for use with radio receiving sets. The plaintiff had developed this tube through periods of prior experimentation and had expended large sums of money therein and in introducing this tube into use in interstate commerce by manufacturers of radio receiving sets and by dealers in such sets and had created and then possessed a large and valuable good will in this interstate commerce and then

had a large and profitable established interstate business therein, so that for the year 1926 the net profits of said business actually realized and received were $454,935. Said business then had an established prospect of large increase, and said business and the good will thereof was of a present value of exceeding three million dollars.

7. Prior to the year 1926 the defendant was engaged in interstate and foreign commerce in divers kinds of radio apparatus and in radio communication. When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign com- [fol. 16] merce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition.

8. At this time there were many devices either necessary or desirable for the successful operation of radio receiving apparatus which were the subject of Letters Patent of the United States, owned by independent individuals, firms and corporations, and these were independent sources of supply for radio apparatus dealers and manufacturers who could obtain by negotiation with these independent competitors the patented articles and leases and licenses under the patents to manufacture and sell and use such articles.

9. For the purpose aforesaid and pursuant to the plan and conspiracy aforesaid the defendant conspired with several of these independent owners of Letters Patent, and of devices for radio receiving apparatus, to acquire as many as possible of these patents or exclusive licenses thereunder. Many of these patents were for competitive devices. Some of these licenses were absolutely exclusive, and others were exclusive with limited exceptions which would not interfere in actual conduct of business with the defendant's monopoly.

10. The defendant carried out this conspiracy and obtained this monopoly in the manner planned, and so completely that by the year 1927 it was practically impossible for manufacturers or dealers in commercially vendable radio receiving sets of the standard demanded by the purchasing public to manufacture or to sell such a set without

the consent of the defendant with respect both to devices for which the defendant held the patent and to devices for which the defendant held no patent.

11. The defendant has full knowledge of the various conveyances, agreements, leases, licenses, understandings and methods whereby the defendant has accomplished this monoply, and the plaintiff has not first-hand knowledge of any of them, but has reliable information as to many of them. The plaintiff abstains from setting them forth in [fol. 17] this declaration, because such allegations would involve the names of other persons, firms and corporations not parties to this suit.

12. By the year 1927 the defendant had so far perfected this unlawful monopoly in interstate commerce in radio receiving set apparatus that wholly by reason thereof it exerted by its illegal acts an illegal duress upon all those engaged in this branch of interstate commerce so that they were compelled involuntarily to deal with the defendant upon such terms as the defendant dictated or to cease business.

13. In the progress of this industry up to the beginning of the year 1927, it was the regular course of business for manufacturers of radio receiving sets to manufacture them and to sell them to jobbers and to dealers without tubes and for the jobbers or the dealers to procure tubes in the open market with which to equip them on or after the retail sale of them.

14. Radio receiving sets in ordinary course outlast the tubes first supplied with them. There is a recurring business in the supply of tubes to take the place of those worn out in use. It is the ordinary course of this business that the owner of a radio receiving set seeks replacement tubes of the same kind as those supplied with the set originally. As a result of this, control of the kind of tubes originally installed in the set or initially supplied for its use is in practice a control of the entire replacement business.

15. At the beginning of the year 1927 the defendant had no legitimate control over the trade and commerce either intrastate, interstate, or foreign, in radio receiving set tubes; but it was competing in the interstate and foreign commerce for the radio tube business and was in competi-

tion in that interstate and foreign commerce with the plaintiff.

16. By the beginning of 1927 the plaintiff had produced in the Raytheon rectifying tube the best rectifying tube for a radio receiving set that has been manufactured up to the present time.

17. By the beginning of 1927 the plaintiff was doing approximately eighty-five percent of the business in rectifier tubes of the entire United States. The plaintiff was selling and shipping these tubes in interstate commerce throughout the United States. [fol. 18] The plaintiff had a large interstate trade with radio set manufacturers, jobbers, dealers and laboratory workers.

18. The defendant pursuant to the plan and conspiracy hereinbefore stated, and as a part thereof and in order to carry it out, determined to restrain, suppress and destroy the competition of the plaintiff and of all other manufacturers of radio receiving set tubes and of all dealers therein, in interstate and foreign commerce, and to do this by contract, combination and conspiracy and thereby to obtain a monopoly of this interstate and foreign commerce.

19. Pursuant to this conspiracy and as one of the means of putting it into effect, the defendant required all persons, firms and corporations, in order to obtain the right to use certain radio receiving set devices on which the defendant held Letters Patent, in the manufacture and sale of radio receiving sets and which were necessary therefor, to enter into the form of contract with the defendant hereinafter set forth.

20. The defendant put this step in this conspiracy into effect in the summer of 1927.

21. The defendant did not at this time hold any Letters Patent entitling it to any monopoly in radio tubes and has not since acquired any such patents.

22. In putting this step in this conspiracy into effect, the defendant combined and conspired with the holders of other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers, to issue a standard form of license agreement to manufacturers of radio

sets purporting to give to the licensee a non-exclusive license to manufacture at its factory at a particular location and to sell radio apparatus for defined purposes under the Letters Patent owned by the licensors with certain stated exceptions.

23. This form of license contained a provision as follows:

9. Nothing herein contained shall be construed as conveying any licenses expressly or by implication, estoppel or [fol. 19] otherwise to manufacture, use or sell vacuum tubes, except to use and sell the vacuum tubes purchased from the Radio Corporation as provided herein. The Radio Corporation hereby agrees to sell to the licensee and the licensee hereby agrees to purchase from the Radio Corporation the number, and only the number, of vacuum tubes to be used as parts of the circuits licensed hereunder and required to make initially operative the apparatus licensed under this agreement, such tubes to be sold by the Radio Corporation to the licensee at the terms and at the prices at which they are then being sold by the Radio Corporation to other manufacturers of radio sets buying in like quantities for the same purposes. But the sale of such tubes by the Radio Corporation to the licensee shall not be construed as granting any licenses except the right to sell such tubes for use in, and to use them in, the apparatus made and sold hereunder.

24. The state of the industry at this time was such, and the habits of the purchasing public were such, that this clause in its effect gave the defendant an illegal monopoly of the interstate and foreign commerce in tubes for radio receiving sets throughout the United States, because of the facts hereinbefore and hereinafter stated.

25. Radio set manufacturers could not manufacture radio receiving sets of the standard required by the purchasing public without incorporating into such sets, devices other than tubes described in Letters Patent owned or controlled by the defendant.

26. This patent control by the defendant and the apparent requirements of said clause 9 were known both to manufacturers and to dealers in radio receiving sets throughout the United States.

27. The great majority in volume of manufacturers and dealers in radio receiving sets throughout the United States did not dare to manufacture or to handle radio receiving sets of the standard required by the buying public in defiance of the provisions of these patents without license from the defendant and without compliance with the apparent requirements of said clause 9.

[fol. 20] 28. As a result of this, by these means the defendant completed and carried out its said plan and conspiracy and thereby restrained, suppressed and destroyed the existing competition in the manufacture of and interstate and foreign commerce in receiving set tubes.

29. The set manufacturers, to avoid the danger of unfounded suits by the defendant, and for no other reason, ceased to purchase tubes from the plaintiff and other manufacturers for initial installation in the sets manufactured by them.

30. For the same reason, and no other, experimentalists in radio receiving set manufacture and in tubes therefor ceased to purchase tubes from the plaintiff and other tube manufacturers because of the belief which the defendant had created that such experimentation was useless because the commercial field for such tubes and sets equipped with them had been destroyed by the defendant.

31. The interstate and foreign commerce in replacement business in tubes was destroyed because it was the practice of radio receiving set purchasers to seek, as replacements of worn-out tubes, tubes of the same kind as those supplied for the initial installation. The actual conditions in the industry and in the interstate and foreign commerce were such that a licensee would not under such circumstances invite litigation when immunity therefrom might be had by equipping every receiving set made by him, whether believed to be within the scope of the patents of the licensor or not, with the tubes of the defendant.

32. During the year 1927, as a part of the conspiracy aforesaid and as a step in carrying it out, the defendant issued about twenty-five licenses as above described, all containing the illegal clause aforesaid. These were all accepted and executed by the licensees and thereby the defendant, pursuant to and as a part of its plan and conspir-

acy as aforesaid, made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several States and with foreign nations, and combined and conspired with them to monopolize the commerce among [fol. 21] the several States and with foreign nations in radio receiving set tubes and attempted to monopolize said interstate and foreign commerce and did monopolize the same and made leases, licenses and sales and contracts for commodities for use, consumption or resale within the United States on the condition, agreement or understanding that the licensee, lessee or purchaser thereof shall not use or deal in the radio receiving set tubes of competitors of the defendant where the effect of such lease, sale and contract for sale and such condition, agreement and understanding was substantially to lessen competition and tended to create a monopoly in said interstate and foreign commerce.

33. At all of said times the defendant had a place of business in the District of Massachusetts and conducted business therein and made some of said licenses therein, and the liability to the plaintiff resulting from the illegal acts aforesaid arose and has ever since remained outstanding against the defendant in the Commonwealth of Massachusetts.

34. The effect of the aforesaid illegal plan and conspiracy, and of the aforesaid illegal conduct of the defendant in carrying it out, upon the interstate and foreign commerce in tubes as aforesaid and upon that commerce of the plaintiffs, was gradual during the latter part of the year 1927. By the end of 1927 said plan and conspiracy and said conduct in carrying it out had completely destroyed the profitable interstate and foreign commerce of the plaintiff and thereby, by the early part of 1928, the said tube business of the plaintiff and the property good will of the plaintiff therein had been totally destroyed at a time when it then had a present value in excess of three million dollars and thereby the plaintiff was then injured in its business and property in a sum in excess of three million dollars.

35. Wholly because of this destruction and of the illegal duress aforesaid which the defendant had imposed as aforesaid on this industry and this interstate and foreign com-

merce, the plaintiff and its Delaware corporation were compelled to seek and accept a license from the defendant.

36. With knowledge of this compulsion and relying on its [fol. 22] effectiveness, the defendant exercised its illegally acquired power as aforesaid to compel the plaintiff and its said Delaware corporation to execute a purported release of claims against the defendant.

37. The illegal duress aforesaid by the defendant rendered said release void and the plaintiff has never executed a valid release of said claim.

38. When the Raytheon Manufacturing Company was organized in 1928 under the laws of Delaware, in order to avoid any doubt as to the assignability of the claim against the defendant an understanding was reached that the claim should be as between the two corporations, in beneficial interest the property of the Delaware corporation and that it should be prosecuted for the benefit of the Delaware corporation by the plaintiff.

39. At the time of the execution of the void release aforesaid the defendant agreed with the plaintiff on or about March 19, 1929, that notwithstanding the general release to the defendant, that if, hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated "9" in certain license agreements and "g" in certain other license agreements heretofore made by the licensors with manufacturers of radio receiving apparatus (said clause "9" having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment, or agreement of settlement, or otherwise, then the licensee shall become entitled to assert its claim for such damages and none of the licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; and if the licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other

claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement.

[fol. 23] 40. The illegal duress aforesaid rendered said limit on the amount of recovery and the method of its payment void.

41. In September or October, 1931, the defendant made pecuniary recognition to the extent of not less than $1,600,000, and remission of past royalties in addition, to a claimant which was a group of manufacturers of radio receiving set apparatus becoming licensed by the defendant under all or a substantial part of the patents under which a license was granted by the agreement aforesaid, which pecuniary recognition was of its claim in consequence of judgment or agreement of settlement or otherwise.

42. The injury done to this claimant by the acts of the defendant as aforesaid was much less in amount than the injury done to the plaintiff.

43. By reason of the facts aforesaid, even if the limitation imposed on recovery by said agreement were valid, the plaintiff is entitled to recover not less than $1,600,000 and the amounts of remissions of royalties as aforesaid.

44. The plaintiff makes a part of this count the disclaimer filed in this court on or about March 5, 1932. The plaintiff disclaims to recover under this count any sum of money which the plaintiff recovers under the original count of this declaration filed in this case on December 14, 1931.

45. The plaintiff by reason of the facts hereinbefore alleged and the violation thereby of Title 15, chapter 1, section 14, of the Code of Laws of the United States, hereby claims and is entitled to recover not less than three million (3,000,000) dollars three-folded to not less than nine million (9,000,000) dollars and the costs of this suit including a reasonable attorney's fee.

By its Attorneys, Nutter, McClennen & Fish, Edward F. McClennen, E. Curtiss Mower, Jr.

Upon the filing of the writ and declaration herein, an order to plead was entered.

[fol. 24] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO STRIKE OUT CERTAIN ALLEGATIONS IN THE WRIT AND DECLARATION—Filed January 30, 1932

The defendant in the above-entitled action moves that all allegations contained in the plaintiff's writ and declaration relating to Raytheon Manufacturing Company, a Delaware corporation, be stricken therefrom as immaterial and impertinent, said allegations being more particularly described as follows:

In the writ the allegation reading:

"Incorporated also under the laws of the State of Delaware for the benefit also of which said corporation this action is brought;"

In the declaration the allegation in paragraph 1 reading:

"Incorporated also in 1928 under the laws of the State of Delaware for the benefit also of which said corporation this action is brought;"

The allegation in paragraph 3 reading:

"For itself and for the benefit of said Raytheon Manufacturing Company organized under the State of Delaware."

The allegation in paragraph 35 reading:

"And its Delaware corporation."

The allegation in paragraph 36 reading:

"And its said Delaware corporation."

All allegations contained in paragraph 38.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEMURRER—Filed January 30, 1932

Now comes the defendant in the above-entitled action and demurs to the plaintiff's declaration therein and for causes of demurrer shows:

1. The declaration does not state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action.

2. The plaintiff, Raytheon, Inc., a Massachusetts corporation, purports to bring said action in its own interest and behalf and also for the benefit of and as representative for Raytheon Maunfacturing Company, a Delaware corporation, and thereby the plaintiff joins an action in its own right with one in a representative capacity in the one declaration.

3. It appears from the said declaration that the true name of the plaintiff is Raytheon, Inc., whereas the action is prosecuted by the plaintiff under the name of Raytheon Manufacturing Company which is not the true name of the plaintiff.

4. It appears from the said declaration and particularly from paragraph 5 thereof that the plaintiff alleges as its cause of action acts alleged to violate the provisions of Title 15, chapter 1, sections 1, 2 and 14, of the Code of Laws of the United States and acts alleged to be illegal by reason of the provisions of said sections 1 and 2 cannot be combined in a single count with acts alleged to be illegal by reason of said section 14.

5. The several allegations contained in the declaration and hereinafter listed and set forth do not state a cause of action against the defendant and are wholly immaterial, irrelevant and impertinent to the cause of action which the remaining allegations of the declaration purport to state. Said immaterial, irrelevant and impertinent allegations are as follows:

In paragraph 5 the words (lines 1-6):

"has made contracts and engaged in a combination and conspiracy in restraint of trade and commerce among the several states and thereby has attempted to monopolize [fol. 26] and has combined and conspired with others to monopolize trade and commerce among the several states, and"

And the words (lines 6-7):

"and as a part of said conspiracy and in carrying the said conspiracy out."

And the words (line 14):

"Sections 1 and 2 and"

And the words (line 16):

"the illegal conjunction of".

In paragraph 7 the words (lines 3-11):

"When so engaged the defendant formed the plan and conspired to suppress, restrict and destroy all competition of others in this branch of interstate and foreign commerce and to monopolize that commerce. A large number of other concerns were at this time engaged in this branch of interstate and foreign commerce in competition with the defendant and there was then an established prospect of a substantial expansion of this interstate and foreign competition."

All allegations contained in paragraphs 8, 9, 10, 11 and 12.

All allegations contained in paragraph 16.

All allegations contained in paragraph 18.

In paragraph 19 the words (lines 1-2):

"Pursuant to this conspiracy and as one of the means of putting it into effect".

In paragraph 20 the words (line 1):

"In this conspiracy."

In paragraph 22 the words (line 1):

"in this conspiracy".

And the words (lines 2-5):

"combined and conspired with the holders of other patents covering necessary devices other than tubes for the manufacture of radio frequency receivers".

[fol. 27] In paragraph 24 the words (lines 5-6):

"because of the facts hereinbefore and hereinafter stated".

In paragraph 28 the words (lines 1-2):

"completed and carried out its said plan and conspiracy and".

In paragraph 32 the words (lines 1-2):

"As a part of the conspiracy aforesaid and as a step in carrying it out".

And the words (lines 5-13):

"pursuant to and as a part of its plan and conspiracy as aforesaid made contracts with the licensees and engaged in combinations and conspiracies with them in restraint of interstate and foreign commerce among the several states and with foreign nations, and combined and conspired with them to monopolize the commerce among the several states and with foreign nations in radio receiving set tubes, and attempted to monopolize said interstate and foreign commerce and did monopolize the same and".

In paragraph 34 the words (lines 1-2):

"the aforesaid illegal plan and conspiracy and of"

And the words (lines 2-3):

"In carrying it out."

And the words (lines 5-6):

"said plan and conspiracy and"

And the words (line 7):

"In carrying it out."

6. The several allegations contained in the declaration and hereinafter listed and set forth are wholly immaterial, irrelevant and impertinent:

In paragraph 1 the words:

"Incorporated also in 1928 under the laws of the State of Delaware for the benefit also of which said corporation this action is brought."

[fol. 28] In paragraph 3 the words:

"For itself and for the benefit of said Raytheon Manufacturing Company organized under the State of Delaware."

In paragraph 35 the words:

"And its Delaware corporation."

In paragraph 36 the words:

"And its said Delaware corporation."

All allegations contained in paragraph 38.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

I, John L. Hall, counsel for the defendant in the above-entitled action, hereby certify that this demurrer is filed in good faith, that there is such probable ground in law therefor as to make it a fit subject for judicial inquiry, and that it is not intended merely for delay.

John L. Hall.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

Also at the same term, to wit, March 5, 1932, a disclaimer and motion to amend declaration was filed.

This cause was thence continued to the March Term, A. D. 1932, when, to wit, March 16, 1932, the aforementioned motion to amend declaration was allowed by consent, the Honorable Elisha H. Brewster, District Judge, sitting.

On the said sixteenth day of March, said cause came on to be heard on the motion to strike out certain allegations in the writ and declaration and on demurrer, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence taken under advisement and on the eighteenth day of March, 1932, a memorandum of court was announced reserving decision until counsel have opportunity to consider the suggestion of the court as to amending the declaration.

At the same term, to wit, March 22, 1932, a motion to amend the declaration by adding a second count was filed and allowed and a second count to the declaration filed accordingly.

[fol. 29] Also on the twenty-second day of March, 1932, it was ordered by the court that the motion to strike out certain allegations in the writ and declaration be denied and the demurrer be overruled.

Also at the same term, to wit, April 11, 1932, an answer was filed. Said answer was subsequently amended on October 10, 1932, and allowed by the court on November 8, 1932.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER AS AMENDED

[Filed April 11, 1932; Motion to Amend Filed October 10, 1932; Allowed November 8, 1932]

Now comes the defendant in the above-entitled action and for its answer denies each and every material allegation in the plaintiff's writ and declaration and both counts thereof contained.

And further answering the defendant says that after all the said alleged acts of the defendant set forth in said declaration and both counts thereof had taken place and all damage alleged to have arisen therefrom had accrued, to wit, on or about March 19, 1929, the plaintiff for a good and valuable consideration released the defendant from any and all claims, demands and/or causes of action which it then had or might have against the defendant;

The said release was under seal and was not executed under duress;

And further answering the defendant says that any cause of action mentioned in Count 2 of the said declaration did not accrue within three years before the commencement of this action and is barred by section 6 of chapter 146 of the Revised Statutes 1915 of the State of Delaware.

By its Attorneys, John L. Hall, Choate, Hall & Stewart.

[fol. 30] IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER CASE TO EQUITY FOR A PRELIMINARY HEARING UPON THE VALIDITY OF THE RELEASE GIVEN BY THE PLAINTIFF.—Filed October 10, 1932

Now comes the defendant in the above-entitled case and moves that the said case be transferred from the law side to the equity side of this Honorable Court for a preliminary hearing upon the issue of the validity of the release executed by the plaintiff upon the following grounds:

1. In its answer the defendant has alleged that the plaintiff released the defendant from all claims.

2. The plaintiff has conceded in paragraphs 36 and 37 of Counts 1 and 2 of its declaration that the plaintiff did execute such a release, but the plaintiff alleged that the said release was executed under duress.

3. The said release was under seal in that the plaintiff adopted the seals of the other parties who signed the release.

4. A release under seal cannot be avoided in an action at law.

5. Great delay and expense would be saved by a preliminary hearing on this issue.

By its Attorneys, Choate, Hall & Stewart.

On the said tenth day of October A. D. 1932, Defendant's Motion for Specifications was filed, items one and twenty-four being as follows:

IN UNITED STATES DISTRICT COURT

EXTRACTS FROM DEFENDANT'S MOTION FOR SPECIFICATIONS. —Filed October 10, 1932

Now comes the defendant in the above-entitled action and moves that the plaintiff be required to file a bill of particulars specifying the following matters and details:

1. State the character and type of the radio tubes alleged in paragraph 6 of Count 1 and in paragraph 6 of Count 2 of the declaration to have been manufactured, distributed and sold in interstate commerce by the plaintiff for use with radio receiving sets: (a) prior to the year [fol. 31] 1926; (b) during the year 1926; (c) during the year 1927 prior to March 1; (d) during the remainder of the year 1927; (e) throughout such subsequent period, if any, during which the plaintiff claims herein to have been damaged; (f) during the calendar year next ensuing after the expiration of the period mentioned in (e) above; and if manufactured under patent rights, the number or numbers of such patent or patents and the date or dates of issue of the same. Also deliver to the defendant with the particulars herein demanded three physical specimens of each type of tube so manufactured, distributed and sold by

the plaintiff, giving the dates when each such type was first placed on the market, and the dates when they were discontinued (if any of them have been discontinued).

* * * * * * *

24. State whether the understanding referred to in paragraph 38 of Count 1 and in paragraph 38 of Count 2 was oral or written, and if written, file with the particulars herein demanded a copy thereof.

* * * * * * *

By its Attorneys, Choate, Hall & Stewart.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

At the same term, to wit, November 8, 1932, it was ordered by the court, the Honorable James A. Lowell, District Judge, sitting, that the motion to amend answer be allowed, no one appearing in opposition.

On the said eighth day of November, A. D. 1932, this cause was set down for hearing on the aforementioned defendant's motion for specifications, the Honorable James A. Lowell, District Judge, sitting, and it was ordered that the motion be allowed, except item No. 2 as to quarterly business, and that specifications be filed by January 5, 1933.

Also on the said eighth day of November, A. D. 1932, this cause was set down for hearing on the aforementioned motion to transfer case to equity, the Honorable James A. Lowell, District Judge, sitting, and it was ordered by the court that said motion be allowed.

On the ninth day of November, 1932, a plaintiff's bill of exceptions remotion for transfer was filed and allowed.

[fol. 32] On the eighth day of November, 1932, case No. 5021 Law Docket having been transferred to the above equity case No. 3767, the following Plaintiff's Motion for Framing Jury Issues was filed on the twelfth day of said November:

In United States District Court

No. 3767

Equity Docket

Raytheon Manufacturing Company, Plaintiff,

v.

Radio Corporation of America, Defendant

Plaintiff's Motion for Framing Jury Issues.—Filed November 12, 1932

Now comes the plaintiff in the above action, without waiving hereby its objections to the jurisdiction of this Honorable Court but expressly relying thereon, and moves that the court order the framing of an issue to be tried by a jury upon the issue of the validity of the release executed by the plaintiff.

The plaintiff suggests that it be framed as follows:

Was the release dated March 19, 1929 executed by the plaintiff under duress?

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

In United States District Court

Motion to Amend Defendant's Answer.—Filed and Allowed December 22, 1932

Now comes the defendant in the above-entitled cause and moves that its answer be amended by adding the following:

And further answering paragraphs 35 through 43 of Count I and of Count II of the plaintiff's declaration, the [fol. 33] defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of the license granted by the defendant to the Raytheon Manufacturing Company set forth in paragraph 35 of the said declaration, that over two years elapsed since the execution of the said release and the said license before the

present suit was brought in December, 1931, that at no time since the execution of the said release and the said license and prior to bringing the present suit has the plaintiff asserted any claim that the said release was void or voidable for duress or for any other reason, that in reliance upon the plaintiff's acceptance of the said release and the said license, the defendant has granted certain rights under the said license, has forborne from suing the plaintiff for infringement, has accepted royalties under the said license and in many other respects has altered and changed its position; and the defendant says that the plaintiff has been guilty of laches and by reason of its said unreasonable delay and acquiescence, the plaintiff cannot now assert that the said release was void because of duress.

And for further answer to paragraphs 35 through 43 of Count I and Count II of the plaintiff's declaration, the defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of the license granted by the defendant to Raytheon Manufacturing Company of Delaware set forth in paragraph 35 of Counts I and II of the plaintiff's declaration, that as a further integral part of the said license the said Delaware Company also executed a release under seal to the defendant, that over two years have elapsed since the execution of the said releases and of the said license prior to the bringing of this suit, that the plaintiff and the said Delaware Company ever since March 19, 1929, and up to the time this suit was brought in December, 1931, have voluntarily acquiesced in, confirmed and ratified the said license and the said releases, and paid royalties thereunder and have asserted their rights thereunder; that on December 14, 1931, the same day on which the present suit was brought, the said Raytheon Manufacturing Company of Delaware brought a bill in equity in the Su- [fol. 34] preme Court of the Commonwealth of Massachusetts, Equity No. 55069, to affirm the said license and to enjoin the defendant from terminating the said license, that the said bill in equity was referred to a Master, and that hearings were had before the said master and his report was confirmed by the Supreme Court of the said Commonwealth and an order was entered by the Supreme Court enjoining the defendant from terminating the said license so long as the said Delaware Company should pay the defend-

ant all royalties due thereunder; that it is alleged in the plaintiff's disclaimer that the present suit is brought for the sole benefit and at the instance and expense of the said Delaware Corporation; that whether or not the said license and the said releases were executed under duress as alleged, the plaintiff and the said Delaware Company have ratified and confirmed the said releases and the said license by their voluntary acquiescence, acts and payments of royalties, and cannot now be heard to assert that the said releases were executed under duress.

And for further answer to paragraphs 35 through 43 of Count I and Count II of the plaintiff's declaration, the defendant says that on March 19, 1929, the plaintiff executed a general release under seal to the defendant, that the said release constituted an integral part of a license granted by the defendant on the same day to the Raytheon Manufacturing Company of Delaware set forth in paragraph 35 of Counts I and II of the plaintiff's declaration, that as a further integral part of the said license the said Delaware Company also executed a release under seal to the defendant, that on December 14, 1931, the same day on which the present suit was brought, the said Raytheon Manufacturing Company of Delaware brought a bill in equity in the Supreme Court of the Commonwealth of Massachusetts, Equity No. 55069, to affirm the said license and to enjoin the defendant from terminating the said license, that the said bill in equity was referred to a master, and that hearings were had before the said master and his report was confirmed by the Supreme Court of the said Commonwealth and an order was entered by the Supreme Court enjoining the defendant from terminating the said license so long as [fol. 35] the said Delaware Company should pay the defendant all royalties due thereunder. The defendant, therefore, says that the said Delaware Company has finally elected to affirm the said license, that the said releases were and are an integral part of the said license, and that the said Delaware Company is barred from now asserting directly or indirectly that its said release is void by reason of duress, that it is alleged in the plaintiff's disclaimer that the present suit is brought for the sole benefit and at the instance and expense of the said Delaware Company and the said plaintiff is barred by the election of said Delaware

Company from asserting that its own said release was executed under duress.

By its Attorneys, Choate, Hall & Stewart.

December 22, 1932. Allowed.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

EXTRACTS FROM PLAINTIFF'S BILL OF PARTICULARS—Filed January 16, 1933

Pursuant to the order of the court entered on November 8, 1932, the plaintiff files the following bill of particulars:

1. Plaintiff's rectifying tubes and patents.

With reference to the character and type of the radio tubes manufactured, distributed and sold by it in interstate commerce, the plaintiff specifies as follows:

(a) Prior to 1926 it manufactured, distributed and sold in interstate commerce type B rectifying tubes.

(b) During 1926 it manufactured, distributed and sold in interstate commerce types B and BH rectifying tubes.

(c) During 1927 prior to March 1, it manufactured, distributed and sold in interstate commerce types B and BH rectifying tubes.

[fol. 36] (d), (e) and (f) During the remainder of 1927 and throughout the period during which it claims to have been damaged and during the calendar year next ensuing after the expiration of that period, it or after May 29, 1928, its Delaware corporation, manufactured, distributed and sold in interstate commerce types B, BH and BA rectifying tubes.

The plaintiff further specifies that it manufactured, distributed and sold the foregoing types of rectifying tubes under its common law and patent rights, including the following Letters Patent of the United States:

Number of patent	Date of issue	
1,545,207,	July 7, 1925.	
1,617,171,	Feb. 8, 1927.	
1,617,172,	Feb. 8, 1927.	
1,617,174,	Feb. 8, 1927.	
1,617,177,	Feb. 8, 1927.	
1,617,178,	Feb. 8, 1927.	
1,617,179,	Feb. 8, 1927.	
1,617,180,	Feb. 8, 1927.	
1,617,181,	Feb. 8, 1927.	
1,679,449,	Aug. 7, 1928	(application June 13, 1927).
1,731,889,	Oct. 15, 1929	(application June 26, 1922).
1,738,169,	Dec. 3, 1929	(application May 8, 1923).
1,841,288,	Jan. 12, 1932	(application Nov. 29, 1924).
1,841,289,	Jan. 12, 1932	(application May 16, 1925).
1,880,814,	Sept. 27, 1932	(application April 14, 1925).
1,887,868,	Nov. 15, 1932	(application Nov. 3, 1925).

The plaintiff further specifies that it has not in its possession any physical specimens of any of the types of tubes so manufactured, distributed and sold by it during the periods hereinbefore referred to.

* * * * * * *

24. Understanding between plaintiff and its Delaware Corporation.

The plaintiff specifies that the understanding referred to [fol. 37] in paragraphs 38 of Counts 1 and 2 was at first oral. Later it was reduced to writing in the terms of the disclaimer now on file in the case.

By its Attorneys, Nutter, McClennen & Fish.

In United States District Court

Minute Entries

This cause was then continued to the March Term, A. D. 1933, when, to wit, April 4, 1933, said cause came on to be heard on the aforementioned plaintiff's motion for framing

jury issues, the Honorable James A. Lowell, District Judge, sitting, and it was ordered by the court that the motion be denied.

At the same term, to wit, April 6, 1933, a plaintiff's bill of exceptions re motion for framing jury issues was filed and allowed.

This cause was thence continued from term to term to the December Term, A. D. 1933, when, to wit, January 3, 1934, the following Plaintiff's Motion to Rescind, Vacate or Supersede the Order of November 8, 1932, Allowing Motion to Transfer to Equity was filed:

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO RESCIND OR TO VACATE OF TO SUPERSEDE THE ORDER OF NOVEMBER 8, 1932, ALLOWING MOTION TO TRANSFER TO EQUITY—Filed January 3, 1934

The plaintiff moves the court to rescind or to vacate or to supersede the order entered on the record of this case on or about November 8, 1932, whereby was allowed the defendant's "Motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff".

The plaintiff assigns for this motion to rescind or to vacate or to supersede the reasons following:

The motion to transfer was granted on the misapprehension of the court that the defendant alleged a release under seal valid at law and that the plaintiff claimed that this release was wholly void in equity or that the plaintiff had because of duress a right in equity to be relieved in equity from the operation of a release valid at law.

To remove any chance for doubt, the plaintiff hereby [fol. 38] disclaims any right or remedy in equity in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress.

Following this disclaimer, the issue, as to duress, for trial is whether the purported release which was obtained by the defendant from the plaintiff was originally obtained in fact by the duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein by contract, combination or con-

spiracy or otherwise or by monopolizing or attempting to monopolize interstate trade in violation of Code of Laws of the United States, Title 15, chapter 1, sections 1, 2 and 14, or any of them, and if so whether a court of law not equity of the United States will adjudge originally valid a release so obtained, notwithstanding such duress.

A court of equity is without jurisdiction of these issues when presented in an action at law in which as to such duress neither party claims an equitable right or seeks an equitable remedy.

The plaintiff has and claims a right to trial by jury on this issue which arises in an action at law.

A decision by a judge without a jury on this issue of fact, whether sitting in equity or at law, rendered without the acquiescence of the plaintiff would not conclude the question or prevent its trial before a jury. Also, as there is under the contemporaneous agreement (declaration, par. 39), a limited right of recovery even if the release were valid, the establishment of its validity would not prevent a trial before the jury on the issues of monopolization and restraint of trade. These are the same issues which must be tried in order to determine the issue of duress. The decision of a judge without a jury will not shorten the trial before a jury, or be admissible as advisory to the jury or prevail over the jury, to whose decision the plaintiff is entitled.

The plaintiff appends hereto a supporting memorandum.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 39] *Duly sworn to by E. F. McClennen. Jurat omitted in printing.*

February 2, 1934. Motion denied.

E. H. B., D. J.

Counsel notified.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the twenty-second day of January, A. D. 1934, said cause came on to be heard on the foregoing motion to rescind, vacate or supersede order of allowance to transfer

to equity, the Honorable Elisha H. Brewster, District Judge, sitting, and on the second day of February, 1934, it was ordered by the court that said motion to rescind, etc., be denied.

On the seventh day of February, A. D. 1934, a bill of exceptions to denial of motion to rescind was filed and allowed by the court.

IN UNITED STATES DISTRICT COURT

MOTION FOR ENTRY OF FINAL DECREE—Filed February 12, 1934

The plaintiff insists on its objection to the jurisdiction of this court in equity and to the order of transfer thereto and without waiving said objections says as follows:

1. The plaintiff hereby discontinues, becomes nonsuit and dismisses before any hearing in equity any and all allegations and claims that in equity the release alleged in the plaintiff's declaration and in the defendant's motion for transfer is invalid in equity more than at law and that the plaintiff has any equitable right to a decree declaring said release invalid, or to any relief in equity.

2. The plaintiff admits and avers that it has no right in [fol. 40] equity or to any remedy therein and because, and that, it has a plain, adequate and complete remedy at law in that a court of law will not give force or effect to a release obtained in the manner alleged and having said unlawful effect if enforced.

3. The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest.

4. This suit in equity is now before hearing ripe for final disposition.

Wherefore, the plaintiff moves that a final decree be entered in equity No. 3767, (1) dismissing said suit in equity No. 3767 for the reasons aforesaid, or (2) terminating said

suit in equity No. 3767 in such manner as, in this state of the record, equity requires and (3) thereupon returning the papers originally filed in Law No. 5021 to the court of law.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

On the nineteenth day of said February, A. D. 1934, said cause comes on to be heard on the aforementioned motion for entry of final decree, the Honorable Elisha H. Brewster, District Judge, sitting.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—February 19, 1934

1. The present case was originally brought at law on December 14, 1931, under the Federal Anti-Trust Laws.

2. The defendant pleaded in defense a general release under seal.

3. The plaintiff by way of anticipatory replication in its [fol. 41] declaration alleged, first, that the said release was executed under duress and, second, that in any event the said release was qualified.

4. The defendant moved that the case should be transferred to equity for a preliminary hearing upon the issue of the validity of the release.

5. On November 8, 1932, Judge Lowell sitting at law ruled that the plaintiff could not attack the validity of the release at law for duress. Accordingly Judge Lowell granted the defendant's motion and transferred the case to equity for a preliminary hearing upon the issue of the validity of said release.

6. Subsequently, on January 3, 1934, the plaintiff disclaimed in open court any right or remedy in equity in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress.

7. By paragraph 3 of the plaintiff's present motion for final decree on February 12, 1934, the plaintiff states that

it tenders no evidence in support of any right to relief in equity and has no such evidence.

8. Upon the issue submitted aforesaid to the court sitting in equity, I, therefore, rule that the release is valid.

February 19, 1934.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—February 19, 1934

This case came on to be heard at this term upon the issue of the validity of the release executed by the plaintiff and was argued by counsel; and thereupon upon the plaintiff's motion of February 12, 1934, it was ordered, adjudged and decreed as follows:

1. The release set forth in the defendant's answer and the defendant's motion to transfer the case to equity and described in paragraphs 36 and 37 of each count of the plaintiff's declaration is valid and binding.

[fol. 42] 2. The case is accordingly transferred back to law for further proceedings in accordance with this decree.

By the Court.

Mary E. Pendergast, Deputy Clerk.

February 19, 1934.

E. H. B., D. J.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the first day of March, A. D. 1934, a plaintiff's bill of exceptions re motion for entry of final decree is filed and allowed.

From the foregoing final decree, the plaintiff claimed an appeal to the United States Circuit Court of Appeals for the First Circuit on the ninth day of March, A. D. 1934, which appeal was allowed by the court on the same day.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION FOR TRANSFER—Filed and Allowed November 9, 1932.

Reference may be had to the pleadings and motion for transfer filed in this case on or about October 10, 1932.

This motion, that the said case be transferred from the law side to the equity side of this Honorable Court for a preliminary hearing upon the issue of the validity of the release executed by the plaintiff, was heard by the court on the pleadings and without the introduction of any evidence, except that the release referred to in the motion was introduced and inspected by the court on November 8, 1932. The plaintiff opposed the motion on the ground that the release was void by reason of duress and that therefore the court was without jurisdiction to grant it, and that if it had such jurisdiction it should not exercise it to grant the motion, and in support of both contentions claimed that the plaintiff was entitled to trial by jury on the question of the validity of the release. The court overruled the objections and granted the motion. The plaintiff duly excepted.

The plaintiff prays that its bill of exceptions be allowed.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

[fol. 43] November 9, 1932. Allowed.

James A. Lowell, Judge of the United States District Court.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND BILL OF EXCEPTIONS—Filed and Allowed March 8, 1934

The plaintiff moves that its bill of exceptions allowed November 9, 1932, be amended by adding thereto the true copy, appended hereto marked "A" and "B", of the release inspected by the court as stated in said bill of exceptions.

Edward F. McClennen, Attorney for Plaintiff.

March 8, 1934. Allowed.

Elisha H. Brewster, District Judge.

A.

License agreement dated March 19, 1929, between Radio Corporation of America (hereinafter called the Radio Corporation), General Electric Company and Westinghouse Electric & Manufacturing Company (the Radio Corporation, General Electric Company and Westinghouse Electric & Manufacturing Company being hereinafter called Licensors), and Raytheon Manufacturing Co., a corporation of the State of Delaware, having an office at 238 Main Street, Cambridge, Mass. (hereinafter called Licensee).

Recitals

1. The Licensors represent that they severally own or have the right to grant licenses under various United States Letters Patent relating to, or useful in the manufacture of, Tubes as hereinafter in Section 1 of Article One hereof defined.

2. The Licensors, among other things, are engaged in developing inventions relating to Tubes and improved methods and systems of manufacturing the same.

3. The Licensors have heretofore instituted various suits against infringers of some or all of said United States Letters Patent.

[fol. 44] 4. The Licensee desires to obtain a release of all claims of the Licensors arising from infringements by the Licensee prior to the date hereof in the fields of the licenses herein expressed.

5. The Licensee desires to make lawful use of some or all of the inventions covered by said United States Letters Patent, and to that end desires to acquire the licenses herein expressed.

Now, therefore, in consideration of the promises, of the licenses granted herein by the Licensors to the Licensee and of the mutual covenants herein contained, it is agreed as follows:

Article One. Definitions

For the purposes of this Agreement, the following terms are defined as follows:

Section 1. "Tube" means a device consisting of an envelope which contains two or more electrodes, and which is

to any extent evacuated, or contains gas or vapor under any degree of pressure, and is capable of changing the form of controlling or modifying energy supplied thereto for the purpose of producing or reproducing sound or pictures.

Section 2. "Homes" means all places of residence, permanent or temporary, including, however, as to hotels, hospitals and club houses, only the private living room thereof.

Section 3. "Pictures" means light images, shadows, reflections and other visible reproductions of the aspect or shape of animate or inanimate objects, or of drawings, writings, forms, and other graphic, printed and written matter of all kinds.

Article Two. Licenses

Section 1. Each of the Licensors hereby grants to the Licensee, for the term of this agreement, under all of the United States Letters Patent relating to, or useful in the manufacture of, Tubes which during the term of this Agreement it may own or control or with respect to which it may have the right to grant licenses, but only upon the terms and conditions and for the uses hereinafter specified, a personal, indivisible, non-transferable and non-exclusive license to manufacture complete Tubes at the Licensee's factories located at Cambridge and Newton in the State of [fol. 45] Massachusetts, and not elsewhere without the written permission of the Radio Corporation, and to sell only in the United States, its territories and possessions, complete Tubes manufactured by the Licensee or by any of the other licensees of the Licensors.

Section 2. Tubes may be manufactured and sold under the licenses hereby granted only for use in the United States, its territories and possessions, in (a) radio broadcast reception (including, among other things, television) and (b) reproduction of sound and pictures from records, to be heard or seen in the immediate vicinity of the apparatus used in such reproduction (not including transmission to, or reception at, other points of such sound and pictures), and in each case only for private use in homes for entertainment and educational purposes.

Section 3. The licenses hereby granted do not include any license to sell any part of a Tube, as distinguished from the complete Tube, or any machine, appliance or material, or any part thereof.

Section 4. The Licensee may renew burned out Tubes manufactured by the Licensors or any of their licensees and sell such renewed Tubes, treating them as new Tubes, for all purposes of this Agreement, provided that all trademarks and names on the burned out Tubes (other than those of the Licensee) be completely obliterated and the word "renewed" be plainly and conspicuously etched on the glass of such renewed Tubes.

Section 5. The admission of validity implied in the acceptance of licenses hereunder is limited to the scope and field for which such licenses are granted or agreed to be granted.

Section 6. Nothing herein contained shall be construed as conferring upon the Licensee, either expressly or by implication, estoppel or otherwise, any license under any patents of countries other than the United States.

Section 7. The right of the Licensors, in respect of certain United States Letters Patent, to grant licenses hereunder, is derived from an Agreement dated July 1, 1926, between General Electric Company and American Telephone and Telegraph Company (hereinafter called the Telephone Company) with which the parties are familiar, and the [fol. 46] Telephone Company has assented to the execution of this Agreement by the Licensors on the condition, to which the Licensee agrees, that at any time during the term of this Agreement or any extension thereof, the Licensee will, upon request from the Telephone Company, grant to the Telephone Company, or to any corporation or corporations controlled by the Telephone Company, through ownership of more than fifty per cent (50%) of its issued stock, upon reasonable terms, at least as favorable as those granted to others, such licenses in respect to those United States Letters Patent which the Licensee may at that time own or control, as the Telephone Company may desire in the fields in which the Telephone Company received licenses under said Agreement dated July 1, 1926, continuing during the term of the said Letters Patent.

Section 8. The Licensee agrees, that at any time during the term of this Agreement or any extension thereof it will, upon request from any of the Licensors, grant to any of the Licensors or to any corporation or corporations con-

trolled by any one or more of them, through ownership of more than fifty per cent (50%) of its issued stock, upon reasonable terms, at least as favorable as those granted to others, such non-exclusive licenses in respect of those United States Letters Patent which the Licensee may at that time own or control, as any of the Licensors may desire, continuing during the term of the said Letters Patent.

Article Three. Royalties

Section 1. The Licensee shall pay royalty with respect to all Tubes sold by it, which embody or are made in accordance with or by the use of any invention of any unexpired patent now or hereafter issued under which a license is or may be required hereunder, as follows:

The Licensee shall pay to the Radio Corporation a royalty of ten per cent (10%) on the Licensee's invoice price (before cash discounts, freight or advertising allowances, or similar deductions) of the Tubes licensed under this Agreement and sold by it during the term of this Agreement.

[fol. 47] Section 2. The Licensee's invoice price (before cash discounts, freight or advertising allowances, or similar deductions) of Tubes, which have been consigned, less selling commissions to consignees shall be deemed to be the Licensee's sales price for the purpose of computing the royalties payable hereunder.

Section 3. In computing the amounts upon which the above-mentioned royalties are payable, credit may be taken by the Licensee for all amounts credited by the Licensee to its customers either as a result of price reductions established by the Licensee in respect of Tubes previously sold, or as a result of the return of Tubes by such customers to the Licensee.

Section 4. The Licensee shall report the sale of any Tubes, obtained (subject, however, to the provisions of Section 5 of Article Five hereof) from other licensees of the Licensors licensed to make and sell such Tubes and shall pay royalty thereon, in all respects as though they had been manufactured by the Licensee itself under this

Agreement. Sales of Tubes by the Licensee to other licensees of the Licensors shall be reported to the Licensors, but shall not be subject to payment by the Licensee of royalty thereon.

Section 5. In order to insure to the Radio Corporation the full royalty payments contemplated hereunder, the Licensee covenants that, in the event that any Tubes licensed hereunder shall be sold either (1) to a corporation, firm or association which, or individual who, shall own a controlling interest in the Licensee by stock ownership or otherwise, or (2) to a corporation, firm or asociation in which the Licensee of its stockholders shall own a controlling interest by stock ownership or otherwise, the royalties to be paid hereunder in respect of such Tubes shall be based upon the invoice price at which such purchaser resells said Tubes, rather than upon the invoice price of the Licensee.

Section 6. The Licensee agrees to pay to the Radio Corporation, in each calendar year during the term of this Agreement, royalties aggregating at least fifty thousand ($50,000) dollars.

Section 7. If the Licensors shall in the future grant another license for the same purposes and for the same [fol. 48] territory as provided herein, at a rate of royalty less than ten per cent. (10%) for future manufacture and sale, then the Licensee shall thereafter have the benefit of such lower rate of royalty, provided that the Licensee at the same time accepts all the other conditions and obligations imposed on the Licensee by such other license, and by any agreement referred to therein with any of the Licensors, and makes equal contributions to the Licensors. The Radio Corporation shall notify the Licensee upon the granting of such other license. This provision shall not apply to any agreement or agreements between any of the Licensors themselves or between the Licensors or any of them and the Telephone Company, or any of their respectively owned, controlled or associated corporations, present or futture.

Article Four. Reports and Payments

Section 1. The Licensee, within fifteen (15) days after, and as of, the first days of January, April, July and Octo-

ber in each year respectively during the term of this Agreement (hereinafter called "Quarter Days"), shall furnish the Radio Corporation with written statements, under oath, specifying the total number and invoice price thereof by types of Tubes sold under this Agreement by the Licensee in each month during the preceding quarter, or that part of the preceding quarter during which this Agreement shall have been in force and the totals thereof with respect to all such Tubes. A similar statement shall be rendered within fifteen (15) days after, and as of, the date of the termination of this Agreement covering the period from the last preceding Quarter Day to the date of the termination of this Agreement. The royalty prescribed in Section 1 of Article Three hereof shall be due and payable on the 30th days of January, April, July and October of each year respectively during the term of this Agreement, and on the 30th day following the date of the termination of this Agreement, upon all such Tubes sold by the Licensee during the respective periods covered by the statements above mentioned. Any amount required to bring the aggregate royalty payments for any calendar year, or part thereof that this Agreement shall be in force, up to the amount of the minimum royalties payable for such year, or part of [fol. 49] year, as in Section 6 of Article Three hereof provided, shall be due and payable on the 30th day of January next following such calendar year, or part of year, or, as the case may be, on the 30th day following the date of the termination of this Agreement.

Section 2. Tubes shall be deemed to be sold within the meaning of this Agreement when they have been billed to any vendee, consignee or user, or, if they are not billed, when they have been shipped, delivered, mailed or consigned to any vendee, consignee or user.

Section 3. The Licensee shall keep full, true and accurate written books of account and record of all business done under the licenses granted by this Agreement in sufficient detail to enable the Radio Corporation to ascertain what license fees or royalties are due hereunder. Said books and records shall particularly show the number by types of Tubes made and sold under the licenses granted by this Agreement, the name and address of the purchasers thereof, and the Licensee's invoice price thereof (before cash

discounts, freight or advertising allowances or similar deductions). Said books of account and records shall be open to the inspection of the Radio Corporation or their duly authorized representatives at all reasonable times, and generally the Licensee shall allow such investigation of the Licensee's business and operation in connection with this Agreement as may be necessary to determine the accuracy of the Licensee's accounts, records, reports and payments hereunder.

Article Five. Patent Marking and Trademarks

Section 1. The Licensee shall list on each Tube, or on the carton containing the same, the numbers of the patents which are, in the opinion of the Radio Corporation, involved in such Tubes.

Section 2. The Licensee shall affix to the base of all Tubes, manufactured and sold by the Licensee, which embody patented inventions under which licenses are granted herein, notices reading as follows:

"Licensed only to extent indicated on carton" and shall [fol. 50] inscribe on the cartons containing the same, a license notice reading as follows:

"License Notice. This device is licensed under patent claims of Radio Corporation of America on the device itself but only for use in radio broadcast reception and reproduction of sound and pictures from records, to be heard or seen in the immediate vicinity of the apparatus used in such reproduction (not including transmission to, or reception at, other points of such sound and pictures), and in each case only for private use in homes for educational and entertainment purposes. It is not licensed under patent claims on combinations of the device with other devices or elements, as for example in various circuits and hook-ups, except only for use in apparatus and systems already licensed for use under such patent claims on combinations."

Section 3. All markings and inscriptions provided for by Sections 1 and 2 of this Article Five, shall be of a prominent, fixed and permanent character, and displayed in such manner that dealers and wholesale and retail purchasers and users may see the same at the time of purchase and

sale, and the Licensee's circulars and catalogues referring to said Tubes shall also contain the same markings and inscription. The Licensee will also observe any reasonable requirements which the Radio Corporation, by notice in writing to the Licensee, may impose for the purpose of preventing the use of said Tubes otherwise than in accordance with the licenses hereby granted.

Section 4. The Licensee agrees that neither the name of any Licensor, nor any trademark or brand of any Licensor, nor the name or trademark or brand of any of their other licensees, nor simulation of any of these, shall be used in connection with the advertisement or sale of, or be placed upon any Tubes manufactured under this Agreement, and that it will not handle or deal in Tubes covered by any patents included herein which falsely appear or are falsely sold under any name or trademark, or simulation thereof, either of the Licensors or any of their licensees.

[fol. 51] Section 5. The Licensee agrees to mark on every Tube manufactured or sold by it under this license after April 1st, 1929, the word Raytheon and such other trademark or trademarks as the Licensee shall have given written notice to the Raido Corporation that it has adopted by etching, stamping, or in some other permanent form affixing to every such Tube and, after said date, no Tube shall be a licensed Tube unless it bears such mark or marks of the Licensee or of any of the other licensees of the Licensors.

Article Six. Settlement of Past Damages

Section 1. The Licensee admits that it is indebted to the Licensors to the amount of dollars ($), which sum has been determined and fixed as the amount due from the Licensee to the Licensors in full settlement of all claims for damages to the date hereof for and on account for (but on no other account all past infringement in the fields of the licenses herein granted by the Licensee of the Licensors' patents under which licenses are granted hereby by reason of the manufacturer, use and sale of Tubes by the Licensee. The Licensee will pay one-fifth of said amount upon the execution of this Agreement, and the remaining four-fifths is to be liquidated by crediting against said remaining four-fifths, one-third of all payments under Section

1 of Article Three hereof until said amount is liquidated.

Section 2. The Licensee releases the Licensors, jointly and severally, from any claims or liability on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensee, and from all claims or liabilities of any nature whatsoever arising out of, any acts of any of the Licensors, or any contracts of any of the Licensors with third parties to the date of this Agreement.

Section 3. In the event of any default hereunder or of any breach of covenant by the Licensee, or in the event of the bankruptcy or insolvency of the Licensee or of the appointment of a receiver for its property (not discharged within thirty days after appointment) the obligation of the Licensors to postpone collection of such part of the amount due and payable as provided in Section 1 of this Article Six, [fol. 52] as shall then be unpaid, shall immediately cease and terminate, whether or not this Agreement shall have then been cancelled or terminated by the Licensors as provided for in this Agreement.

Article Seven. Notices

Until written notice of change of address is served by either party upon the other, any notice or request with reference to the subject matter of this Agreement shall be deemed to have been sufficiently given, when, if given to the Licensors, it shall be addressed to the Radio Corporation at its office, No. 233 Broadway, New York City, and when, if given to the Licensee, it shall be addressed to the Licensee at its office, No. 238 Main Street, Cambridge, Mass., and in either case sent by registered mail.

Article Eight. Term and Termination

Section 1. This Agreement shall continue in force until January 1, 1934, unless sooner terminated as hereinafter provided. If the Licensee shall properly and faithfully perform all of its obligations hereunder, the Licensee shall have the option, by giving not less than six months' written notice prior to January 1, 1934, of extending the period of this Agreement until January 1, 1939, unless sooner terminated as hereinafter provided.

Section 2. In the event of the failure by the Licensee at any time during the continuance in force of this Agreement to render any of the statements called for herein upon any of the prescribed dates, or to pay all of the royalties required hereunder when due, or to comply with any of the other obligations of this Agreement, for thirty (30) days after notification from the Radio Corporation by registered mail to the last known place of business of the Licensee, of any such default, this Agreement shall cease and terminate, at the option of the Raido Corporation, thirty (30) days after notice in writing by registered mail to that effect has been forwarded to the Licensee. The Radio Corporation shall also have the right to terminate this Agreement at any time upon the bankruptcy or insolvency of the Licensee or the appointment of a receiver for its property (not discharged within thirty (30) days after appointment), and upon the exercise of such right this Agreement shall [fol. 53] terminate thirty (30) days after notice in writing by registered mail to that effect has been forwarded by the Radio Corporation to the Licensee. No cancellation shall release the Licensee from any of the liabilities accruing to the Licensors hereunder prior to the time such cancellation becomes effective. No failure on the part of the Radio Corporation to exercise its right of cancellation hereunder for any one or more defaults shall be construed to prejudice its right of cancellation for any subsequent default.

Section 3. The termination of this Agreement shall not release the Licensee from any of its liabilities accruing prior to such termination. The expression "term of this Agreement", or similar expression, wherever used herein, shall be deemed to mean the period during which this Agreement shall remain in force as herein provided.

Article Nine. Assignments

Neither this Agreement nor any of its benefits shall be directly or indirectly assigned, transferred, divided or shared by the Licensee to or with any person, firm or corporation whatsoever, without the written consent of the Radio Corporation. This Agreement shall inure to the benefit of the successors and assigns of the several Li-

censors, but shall not inure to the benefit of the successors, assigns, or any legal representatives of the Licensee, without the written consent of the Radio Corporation.

In witness whereof, the parties hereto have caused these presents to be executed by their proper officers thereunto duly authorized, and their corporate seals to be hereunto affixed, as of the day and year first above written.

Radio Corporation of America, by J. G. Harbord, President. R. D. O. C. Attest: L. MacConnach, Secretary. (Seal.)

General Electric Company, by E. W. Allen, Vice-President. H. E. V. Attest: W. Marshall, Asst. Secretary. (Seal.)

[fol. 54] Westinghouse Electric & Manufacturing Company, by Walter Cary, Vice-President. V. S. B. Attest: Warren H. Jones, Secretary. (Seal.)

Raytheon Manufacturing Company, by Laurence K. Marshall, President. Attest: LeRoi J. Williams, Secretary. (Seal.)

B

(Agreement Dated March 19, 1929)

Referring to the agreement of even date herewith between Radio Corporation of America, General Electric Company and Westinghouse Electric & Manufacturing Company (therein and hereinafter called Licensors) and Raytheon Manufacturing Company (therein and hereinafter called Licensee), it is hereby agreed as follows:

(1) That the Licensee, in hereafter asserting any of its own patent rights, shall not, by any of the provisions of the aforesaid agreement, be prejudiced with respect to the scope and validity of any of the Licensors' patents on Tubes of the gas type;

(2) That, during the term of said agreement, Tubes, consisting of an envelope which contains two or more electrodes and a fixed conducting gas upon which the conductivity of the device depends, whether or not including vapor, but without means for producing heat in either the gas or the electrodes or any other parts, except such heat as may be produced by the passage of electricity through the gas, sold by the Licensee for use in supplying power of voltage

regulation to radio receiving sets, shall not be subject to payment by the Licensee of the royalty provided by Section 1 of Article Three of said agreement;

(3) That, notwithstanding the general releases to the Licensors contained herein and in Section 2 of Article Six of the said agreement, if hereafter any claimant for damages alleged to have arisen in the operation of a certain clause designated "9" in certain license agreements and "8" in certain other license agreements heretofore made [fol. 55] by the Licensors with manufacturers of radio receiving apparatus (said Clause "9" having been the subject of injunction in the District Court of the United States for the District of Delaware) becoming licensed under all or a substantial part of the patents under which a license is granted by said agreement, shall obtain a pecuniary recognition of its claim in consequence of judgment, or agreement of settlement, or otherwise, then the Licensee shall become entitled to assert its claim for such damages and none of the Licensors shall be entitled to plead said releases in bar thereof but shall not be prejudiced hereby in the making of any other defenses which they or any of them now have to such claim; and if the Licensee shall be successful in obtaining recognition of its claim for such damages it shall not be entitled in any event to a total amount greater than the largest amount obtained by any other claimant and shall only be entitled to the payment thereof by crediting the same against the royalties payable under said agreement;

(4) That, in all respects, the provisions of Section 8 of Article Two of said agreement shall apply to and bind Raytheon Inc. (a Massachusetts corporation), provided that Raytheon Inc. shall not be required thereby or hereby to grant any license outside of the fields specified in Section 2 of Article Two of the said Agreement;

(5) That the Licensors, jointly and severally, release the Licensee and Raytheon, Inc. (a Massachusetts Corporation) jointly and severally, from any claims or liabilities on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensors, or any of them, and from all claims or liabilities of any nature whatsoever arising out

of, any acts of the Licensee or said Raytheon, Inc. or actions under any contracts of the Licensee or said Raytheon, Inc. with third parties to the date hereof; and

(6) That the Licensee and Raytheon, Inc. jointly and severally, release the Licensors, jointly and severally, from any claims or liabilities on account of past infringement of any United States Letters Patent or rights to or under such Letters Patent owned or controlled by the Licensee [fol. 56] or Raytheon, Inc., and from all claims or liabilities of any nature whatsoever arising out of, any acts of any of the Licensors or actions under any contracts of any of the Licensors with third parties to the date hereof.

Radio Corporation of America, by J. G. Harbord, President. (Seal.) General Electric Company, by E. W. Allen, Vice-President. Westinghouse Electric & Mfg. Company, by Walter Cary, Vice-President. Raytheon Manufacturing Company, by Laurence K. Marshall, President. Raytheon, Inc., by D. T. Schultz, Asst. Treas.

[On letterhead of Choate, Hall & Stewart.]

Boston, Mass., March 7, 1934.

Edward Williamson, Esq., 161 Devonshire Street, Boston, Massachusetts.

Dear Mr. Williamson:

I return the motion to amend the bill of exceptions. I understand that it is precisely the same as the previous motion except that it is entitled at law. The defendant waives any hearing on the allowance of the bill of exceptions, reserving any rights it may have on the question of whether the motion should be in equity or at law.

Yours truly, Richard C. Curtis.

RCC JC. Enclosure.

In United States District Court

Plaintiff's Bill of Exceptions re Motion for Framing Jury Issues—Filed and Allowed April 6, 1933

Reference may be had to the pleadings in the case of Raytheon Manufacturing Company v. Radio Corporation

of America, law No. 5021, and to the motion for transfer to equity, and to the plaintiff's motion for framing jury issues filed on or about November 12, 1932. This motion was heard by the court on April 4, 1933, without the in- [fol. 57] troduction of any evidence, and was denied and the plaintiff duly excepted to such denial and said exception was saved by the court. The plaintiff prays that this, its bill of exceptions, be allowed, and it hereby claims an appeal to the Circuit Court of Appeals from the order denying the motion.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

April 6, 1933, this bill of exceptions allowed.
James A. Lowell, Judge of the United States District Court.

The defendant waives any hearing on the allowance.
Choate, Hall & Stewart, Richard C. Curtis.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION TO RESCIND ORDER ALLOWING TRANSFER—Filed and Allowed February 7, 1934

Reference may be had to the pleadings and to motion by plaintiff to rescind or to vacate or to supersede the order of this court entered on or about November 8, 1932, whereby the defendant's motion to transfer to equity was allowed, filed on or about January 3, 1934. This motion was heard by the court on January 22, 1934, without the introduction of any evidence and was denied on February 2, 1934. The plaintiff hereby duly excepts to the order of the court denying such motion and prays that this, its bill of exceptions, be allowed.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

February 7, 1934, this bill of exceptions allowed.
Elisha H. Brewster, Judge of the United States District Court.

[fol. 58] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS RE MOTION FOR ENTRY OF FINAL DECREE—Filed and Allowed March 1, 1934

At the motion session on February 19, 1934, the plaintiff presented its motion filed on or about February 12, 1934, for final decree, which is incorporated herein by reference. Thereupon the entire proceeding was as stated below:

Mr. McClennen: If your Honor please, I don't know whether your Honor has had opportunity to look at the motion or whether I shall state it.

Brewster, J.: I have read it.

Mr. McClennen: If we are in equity—and for the time being at least we have every appearance of being in equity—there must be a plaintiff in equity, and as the Radio Corporation of America has a validly executed release which we claim to be unenforceable, I assume that the Raytheon Company must be the plaintiff in equity. Being the plaintiff in equity, we desire nothing further of the court in equity, and we ask to dismiss what is tantamount to what is our bill in equity before any hearing of facts. We believe that under the decisions we are entitled to dismiss it any time before hearing, since nothing has happened in equity to affect the rights of the parties.

If we are wrong and cannot dismiss it before hearing in equity, then we have stated in our motion the position that we are prepared to take.

If the court in equity insists that this case is for hearing in equity, we come unwillingly to that hearing and have no evidence to offer in support of any allegations and await the consequences of that situation.

It is obvious that there is no way of presenting this question to the Circuit Court of Appeals until there has been a final decree here, and we ask for a final decree here.

So that the question may go up, we would like a final decree of the kind that we seek. We await such final decree as the court adjudges that we ought to have. We are mani- [fol. 59] festly in this embarrassing position: That if we are right that this matter is not one to be heard in equity, we cannot come forward and save our rights and try the case—we cannot try a question of fact to the court of equity and save our rights to try it over again before a jury. We cannot come forward voluntarily to a hearing on the merits.

Therefore we are here asking the court to enter a final decree in equity, we are taking the consequences if such a decree rightfully be entered otherwise than in our favor.

I know of no other way. I have thought of no other way in which to preserve the rights which we contend for to get the decision of the Circuit Court of Appeals on the question if anything is done to our prejudice.

Brewster, J.: If this matter went to hearing on the merits and the court should find that there was no equitable defence to the release being under seal, what form—what would the form of the decree be then? What would be the form of the final decree to be entered if there should be a hearing on the merits which should go against your clients?

Mr. McClennen: Your Honor's question puts what I believe to be the indication of the correctness of our position that there can be no decree. I know of no decree which can be entered here.

Brewster, J.: I suppose I could find, couldn't I, the fact that there were no equitable defences to the release which could be recognized by a court of equity, and that would dispose of the equitable phase of it. It is up on the equitable side for the purpose of determining whether the release under seal can be avoided. Suppose, after hearing, I should find and rule that the release was good even in a court of equity. I would simply enter a decree that the release was good. Do you want me to do that?

Mr. McClennen: Of course we don't want you to do that; we want you to enter a final decree.

Brewster, J.: If you introduce no evidence to show that the release was voidable, I would have to enter such a decree, wouldn't I?

Mr. McClennen: Of course I think not, not for reasons which I have argued before——

[fol. 60] Brewster, J.: You are willing to take your chances on the legality of the former action of Judge Lowell and myself?

Mr. McClennen: I am willing—"willing" is a strong word. I see no way out of taking some chances. I am firmly convinced, whether rightly or wrongly, that I cannot offer any evidence in the court of equity. And if your Honor should set this down at this moment for hearing on the merits against my protest and would appoint a com-

missioner now, I would be prepared to reiterate the statement I made in the motion.

Brewster, J.: In other words, you make no move to avoid the release?

Mr. McClennen: I would present no evidence in equity on that inquiry.

Brewster, J.: Judge Lowell said it couldn't be done at law. That is the question the higher court has to decide.

Mr. Hall: May it please the court. Of course I think, your Honor, that this case was sent here to determine the validity of the release by Judge Lowell. This is the fourth time the matter has come before the court. The suggestion your Honor makes as to a final decree adjudging that the release was valid and binding, of course would seem to me ought to be in the order. I think with that in the order that there might be no misunderstanding in the future, no misunderstanding of what Judge Lowell has found, and no misunderstanding as to what your Honor has found, so that the purpose of Judge Lowell should not be thwarted, it would be proper to have your Honor make certain findings and the findings I suggest are these:

"(1) That the court at law on November 8"—and I have a copy of these findings here—"ruled that the release was valid at law.

(2) That the case was accordingly, transferred to equity.

(3) That the plaintiff has disclaimed any right to avoid the release in equity"—which is true.

"(4) That the plaintiff has stated in open court that it has no evidence on which the release can be avoided in equity."

[fol. 61] Such findings of course—

Brewster, J.: That last wouldn't be quite right, would it? If you modified it so as to say "The attorney in open court stated he had no evidence which he wanted to offer" that might cover it. They may have had evidence, but didn't feel they wanted to produce it.

Mr. Hall: That is true. That is a proper correction. But, if you will read the third paragraph, the plaintiff contends—"The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such

evidence and therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity to the same extent and with the same effect as if the court in equity should now have set this case for hearing on evidence against the plaintiff's protest."

Brewster, J.: What are you reading from now?

Mr. Hall: The plaintiff's motion for final decree.

Brewster, J.: All right.

Mr. Hall: I have prepared such findings if your Honor cares to have them. I hand these, and a draft of decree, to you.

Brewster, J.: All right.

Mr. McClennen: I judge that your Honor is taking the matter under advisement.

Brewster, J.: You may send up a brief, if you care to, unless you are willing to say you don't care to have me consider this brief. I should think Mr. Hall's suggestion was in order.

Mr. McClennen: May I merely note my protest to your making any one of these findings and ask that my exception be saved if you make any of them.

Brewster, J.: Your exceptions may be saved.

Mr. Hall: I suppose this is true; that this is on Mr. McClennen's motion for final decree—that it appears it is his motion for final decree and not a motion of the defendants.

Brewster, J.: Yes.

Mr. McClennen: Would your Honor appoint the stenographer as commissioner, or whatever the form is in equity; [fol. 62] if you deal with any actual questions? Mrs. Windsor is here and I would like to have her appointed commissioner——

Brewster, J.: The findings I have been requested to make are matters of record in this court. I wouldn't need the evidence.

Mr. McClennen: I should think that is true, and that is one additional reason for my objection to your making any findings because the records speaks so clearly.

Brewster, J.: It can not be a very serious matter. The stenographer may be appointed commissioner in case you want to use what happened here today as a part of the record. There is a decree here, Mr. McClennen, which I might just as well act on now and have your rights pre-

served in the record. It is a final decree disposing of this case and transferring it back to the law side.

Mr. McClennen: You are referring to the one Mr. Hall has just handed to you?

Brewster, J.: Yes.

Mr. McClennen: Will your Honor, in any event, modify it by calling it a final decree so this may be called a final disposition of the matter?

Brewster, J.: By sending it back to the law side it must be a final decree.

Mr. McClennen: Your Honor will save my exception to the entering of this decree?

Brewster, J.: Yes.

Mr. Hall: He only asked for the entry of a decree himself.

Brewster, J.: He can not object to a final decree, but he might object to it in this form.

Mr. McClennen: I object to the change from the decree sought by my motion.

Mr. Hall: Have you any decree, Mr. McClennen, you want entered, other than that?

Mr. McClennen: The decree which I want is indicated by my motion.

The court made the findings of fact handed up by the de-
[fol. 63] fendant's counsel as above stated, which appear on file and are incorporated herein by reference.

The court ordered the entry of the decree as handed up by defendant's counsel as above stated, after adding the word "final", which appears on file.

The plaintiff duly excepted to the making of the findings and to the order for the entry of the decree. These exceptions were allowed.

Thereafter on February 19, 1934, the final decree was entered.

The plaintiff prays that this, its bill of exceptions, be allowed.

By its Attorney, Edward F. McClennen.

March 1, 1934. Hearing on allowance of bill of exceptions; bill of exceptions allowed.

Elisha H. Brewster, Judge of the United States District Court.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL—Filed March 9, 1934

The plaintiff, aggrieved by the final decree entered in this case on February 19, 1934, and by the proceedings on which the same is based, in the respects described in the assignment of errors herewithin, appeals to the Circuit Court of Appeals for the First Circuit from said final decree except so far as said decree transfers this case back to law, and from said proceedings, and prays that this, its claim of appeal, may be allowed and that the transcript of the record proceedings, bills of exceptions and papers upon which the said decree was based, duly authenticated, may be sent to said Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS

The plaintiff assigns that the District Court committed the errors following:

First. In allowing on or about November 8, 1932, the defendant's motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff.

[fol. 64] Second. In denying on or about April 4, 1933, the plaintiff's motion for framing jury issues.

Third. In denying on or about February 2, 1934, the plaintiff's motion to rescind or to vacate or to supersede the aforesaid order of this court entered on or about November 8, 1932, whereby the defendant's motion to transfer to equity was allowed.

Fourth. In adjudging affirmatively, without evidence and in equity in its findings and in its final decree entered February 19, 1934, upon the plaintiff's motion of February 12, 1934, but contrary thereto, that the release set forth in the defendant's answer and elsewhere is both valid and binding and that the further proceedings at law shall be in accordance with this decree.

By its Attorneys, Edward F. McClennen, E. Curtiss Mower, Jr.

March 9, 1934. Bond approved and above appeal allowed not as a supersedeas.

Elisha H. Brewster, United States District Judge.

RECITAL AS TO BOND AND CITATION

Also on the said ninth day of March, 1934, a bond on appeal for costs in the sum of $250 was filed by the plaintiff, Laurence K. Marshall of Cambridge, Mass., and David T. Schultz of Brookline, Mass., acting as sureties, and said bond was approved by the court on the same day.

A citation on appeal was issued on March 9, 1934, being made returnable in the United States Circuit Court of Appeals on April 9, 1934. Service of said citation was duly acknowledged by the attorney for the defendant.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PRÆCIPE—Filed March 19, 1934

In preparing the record the clerk will please print the following:

1. The writ.

2. Plaintiff's declaration as amended by the disclaimer filed March 5, 1932, and by the addition of the second count filed March 21, 1932.

[fol. 65] 3. Defendant's answer as amended November 8, 1932.

4. Defendant's motion to transfer, and allowance thereof November 8, 1932.

5. Plaintiff's bill of exceptions allowed November 9, 1932.

6. The amendment thereto allowed March 8, 1934.

7. Amendment to defendant's answer in December, 1932.

8. Plaintiff's motion for jury issues and denial thereof April 4, 1933.

9. Plaintiff's bill of exceptions allowed April 6, 1933.

10. Plaintiff's motion to rescind, vacate or supersede filed January 3, 1934, and denial thereof on February 2, 1934.

11. Plaintiff's bill of exceptions allowed February 7, 1934.

12. Plaintiff's motion for final decree filed February 12, 1934.

13. Findings of fact and rulings made February 19, 1934.

14. Plaintiff's bill of exceptions allowed March 1, 1934.

15. Final decree.

16. Plaintiff's petition for appeal and assignment of errors, and allowance thereof.

17. Citation on appeal and acceptance of service thereof.

18. Præcipe.

Edward F. McClennen, E. Curtiss Mower, Jr., Attorneys for Plaintiff.

March 19, 1934.

Due and sufficient service of the above præcipe is hereby accepted.

Richard C. Curtis, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S CROSS-PRÆCIPE—Filed March 23, 1934

In preparing the record the clerk will please print the following in addition to the papers named in the præcipe:

1. The defendant's demurrer and the order overruling the same on March 22, 1932.

2. The defendant's motion to strike out all allegations contained in the plaintiff's writ and declaration relating to [fol. 66] Raytheon Manufacturing Company, a Delaware corporation, filed on January 30, 1932, and the denial thereof on March 22, 1932.

3. The defendant's motion for specifications and the plaintiff's answers thereto, items number 1 and number 24 only.

Richard C. Curtis, Attorney for Defendant.

Due and sufficient service of the above cross-præcipe is hereby accepted and the omission of items two through

twenty-three and items twenty-five through twenty-seven in the defendant's motion for specifications and the plaintiff's answers thereto is hereby approved.

E. Curtiss Mower, Jr., Attorney for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 67 & 68] [Memorandum. Orders of enlargement of time for docketing case to, and including, August 1, 1934, are here omitted. A. I. Charron, Clerk.]

[fol. 69] In United States Circuit Court of Appeals for the First Circuit, October Term, 1934

No. 2946

Raytheon Manufacturing Company, Plaintiff, Appellant,

v.

Radio Corporation of America, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Wilson, Morton and Morris, JJ.

Opinion of the Court—Filed April 8, 1935

Morris, J.

This is an appeal by the plaintiff, appellant, from what is termed a final decree in equity entered Feb. 19, 1934, in the United States District Court of Massachusetts.

The action was brought December 14, 1931, by the plaintiff as an action at law. It is based upon the Anti-Trust Laws, U. S. C. A., Title 15, Chap. 1, Sec. 15.

Triple damages are sought totaling $9,000,000. The plaintiff's declaration as amended, contains two counts, one under the Sherman Act and the other under the Clayton Act. The facts set forth are substantially the same in the two counts. The plaintiff alleges that in the year 1926, it was engaged in the manufacture, distribution and sale in inter-state commerce of tubes known as Raytheon rectify-

ing tubes for use in radio receiving sets and that it had built up a large and valuable good will in this interstate commerce business and a large trade from which it realized [fol. 70] in 1926 a net profit of $454,935.00, and that the defendant through manipulation and conspiracy with others has established a monopoly and totally destroyed plaintiff's business.

The defendant, the present appellee, for answer, filed a general denial and set up a general release under seal alleged to have been executed on or about March 19, 1929. Plaintiff's declaration referring to this alleged release says it was executed under legal duress. Defendant's answer denies duress.

After some sparring between the parties involving a motion to strike, demurrer, a motion for specifications and various amendments on one side and the other, the pleadings were finally perfected.

On October 10, 1932, the defendant filed a motion to transfer the case to equity for a preliminary hearing upon the validity of the release. The motion was based upon the following grounds. "1. In its answer the defendant has alleged that the plaintiff released the defendant from all claims. 2. The plaintiff has conceded in paragraphs 36 and 37 and counts 1 and 2 of its declaration that the plaintiff did execute such a release, but the plaintiff alleged that the said release was executed under duress. 3. The said release was under seal in that the plaintiff adopted the seal of the other parties who signed the release. 4. A release under seal cannot be avoided in an action at law. 5. Great delay and expense would be saved by preliminary hearing on this issue."

On November 8, 1932, the defendant's motion to transfer the case to equity was granted by the District Judge, and on November 9, 1932, plaintiff's bill of exceptions to the order was filed and allowed.

On November 12, 1932, the plaintiff filed a motion for the framing of an issue to be tried by jury upon the issue of the validity of the release executed by the plaintiff. The motion was denied April 4, 1933.

[fol. 71] On January 3, 1934, the plaintiff filed a motion on the law side of the docket that the order of November 8,

1932, transferring the case to equity be rescinded or be vacated or be superseded. In this motion the plaintiff disclaimed any right or remedy in equity to be relieved from the operation of the release, but claimed that a court of equity is without jurisdiction of these issues when presented in an action at law in which as to such duress neither party claims an equitable right or seeks an equitable remedy; that the plaintiff has and claims a right to trial by jury on this issue which arises in an action at law.

The foregoing motion was denied February 2, 1934.

On February 12, 1934, the plaintiff filed the following motions for entry of final decree:

"The plaintiff insists on its objections to the jurisdiction of this court in equity and to the order of transfer thereto and without waiving said objection says as follows:

1. The plaintiff hereby discontinues, becomes nonsuit and dismisses before any hearing in equity any and all allegations and claims that in equity the release alleged in the plaintiff's declaration and in the defendant's motion for transfer is invalid in equity more than at law and that the plaintiff has any equitable right to a decree declaring said release invalid or to any relief in equity.

2. The plaintiff admits and avers that it has no right in equity or to any remedy therein and because, and that, it has a plain, adequate and complete remedy at law in that a court of law will not give force or effect to a release obtained in the manner alleged and having said unlawful effect if enforced.

3. The plaintiff tenders in equity no evidence in support of any right to relief in equity and now has no such evidence and, therefore, before hearing, announces the conclusion of its evidence in equity in support of any such right in equity, to the same extent and with the same effect as if the court in equity should now have set this case for hearing of evidence against the plaintiff's protest.

4. This suit in equity is now before hearing ripe for final disposition.

Wherefore the plaintiff moves that a final decree be entered in equity No. 3767, (1) dismissing said suit in equity [fol. 72] No. 3767 for the reasons aforesaid, or (2) terminating said suit in equity No. 3767 in such manner as, in this state of the record, equity requires and (3) thereupon

returning the papers originally filed in law No. 5021 to the court of law."

The above motion came on for hearing February 19, 1934. After hearing, the District Judge filed a rescript of his findings of fact and conclusions of law in which he set forth the various motions and rulings thereon and in conclusion said "upon the issues submitted aforesaid to the Court sitting in equity, I, therefore, rule that the release is valid."

A final decree was entered in accordance with the findings of the court, February 19, 1934.

No evidence was offered or introduced at any stage of the proceedings but the court examined a copy of the contract between the parties embodying the release.

Exceptions were taken, filed and allowed to each of the foregoing orders.

Plaintiff's petition for appeal is as follows:

"The plaintiff, aggrieved by the final decree entered in this case on Feb. 19, 1934, and by the proceedings on which the same is based, in the respects described in the assignment of errors herewithin, appeals to the Circuit Court of Appeals for the First Circuit from said final decree except so far as said decree transfers this case back to law, and from said proceedings, and prays that this, its claim of appeal, may be allowed and that the transcript of the record proceedings, bills of exceptions and papers upon which the said decree was based, duly authenticated may be sent to said Circuit Court of Appeals."

The order of the District court upon plaintiff's petition is as follows: "March 9, 1934. Bond approved and above appeal allowed not as a supersedeas."

Plaintiff assigned the following alleged errors:

"First. In allowing on or about November 8, 1932, the defendant's motion to transfer case to equity for a preliminary hearing upon the validity of the release given by the plaintiff.

Second. In denying on or about April 4, 1933, the plaintiff's motion for framing jury issues.

[fol.73] Third. In denying on or about February 2, 1934, the plaintiff's motion to rescind or to vacate or to supersede the aforesaid order of this court entered on or about

November 8, 1932, whereby the defendant's motion to transfer to equity was allowed.

Fourth. In adjudging affirmatively, without evidence and in equity, in its finding and in its final decree entered February 19, 1934, upon the plaintiff's motion of February 12, 1934, but contrary thereto, that the release set forth in the defendant's answer and elsewhere is both valid and binding and that the further proceedings at law shall be in accordance with this decree."

No judgment of any kind has been entered in the action at law. It is pending for trial. During the progress of the oral arguments a question was raised as to whether or not this court had jurisdiction to entertain the appeal. The defendant does not challenge the plaintiff's right to appeal any of the orders and decrees in question. Both parties express the hope that, in the interests of directness and economy, this court will entertain it. We have every disposition to deal in a practical way with practical questions, but as our jurisdiction is involved, we cannot pass the matter by without consideration. Consent of the parties is not sufficient. The right of appeal is strictly statutory. The provisions of the judicial code on which appeals ordinarily rest are sections 128 and 129 (28 U. S. C. A. Sec. 225, 226). Section 129 relates to appeals from interlocutory orders and decrees in proceedings for injunctions and receivers. Appeals are referred to in Section 274b (28 U. S. C. A. 398), but there is nothing in its language expressly authorizing the right of appeal from an interlocurtory order or decree. The question is whether the order of the district court entered November 8th, transferring the case from law to equity is appealable by reason of the provisions of section 129 when construed in conjunction with section 274b.

The latter section reads as follows:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity [fol. 74] of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is

prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

The right of the defendant to file an equitable defense in the action at law is not questioned. Upon its being so filed the district court transferred the issues raised to the equity side of the docket for trial by the court. This was in a sense an interlocutory order. As to whether or not an appeal therefrom to this court would lie was at the time of the hearing a question upon which circuit courts of appeal had reached conflicting decisions. In the following cases jurisdiction was denied. Emlenton Refining Co. v. Chambers, 14 Fed. (2nd) 104; Weaver v. Atlas Oil Co., 39 Fed. (2d) 847; Cox v. Graves, Knight & Graves, Inc., 55 Fed. (2d) 217; while in the case of American Cyanamid Co. v. Wilson & Toomer Co., 62 Fed. (2d) 1018, jurisdiction was sustained.

The question has now been determined by the opinion of the Supreme Court in the case of Enelow v. New York Life Insurance Company, in an opinion handed down Jan. 7, 1935. We quote from the language of Chief Justice Hughes as follows:

"It is thus apparent that when an order or decree is made under section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court exercising what is essentially an equitable jurisdiction, in effect grants or refuses to grant an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. Such a decree was made in the instant case, and therefore, [fol. 75] although interlocutory, it was appealable to the Circuit Court of Appeals under section 129."

This appears to settle the jurisdictional question, as it is quite clear from a reading of the plaintiff's petition for appeal and its allowance by the District Court that the appeal was not only from what was termed a final decree but from all orders on which it was based, and we now proceed to consider the merits of the controversy.

The several motions and rulings of the court present rather unusual and somewhat tangled questions involving distinctions between the jurisdiction of a court of law as distinguished from equity jurisprudence—distinctions that are by no means clearly marked.

"In suits at common law where the value of the controversy shall exceed twenty dollars the right of trial by jury shall be preserved." Such is the guarantee of the Seventh Amendment to the Federal Constitution. U. S. C. A. Part 2, page 581.

Neither the Congress nor the courts can deprive a litigant of this right. It follows that if the plaintiff in this action is entitled to a trial by jury of the issues raised by the pleadings it must be held error on the part of the district court to transfer the case from law to equity against plaintiff's protest.

If error was committed in this first order, all the subsequent orders made by the court of equity must be extra-jurisdictional.

If the order of transfer was right, no sound reason is presented why the subsequent orders should not be sustained and the final decree of the district court affirmed. It may be conceded that if the defendant's answer and plaintiff's anticipatory replication set forth any ground for equitable relief, no error was committed by the order of transfer dated November 8, 1932, but no equitable relief is sought. The release was set up as a defense in the action [fol. 76] at law. The order of transfer to equity cannot be sustained upon this ground.

It has been argued that a distinction should be made between a release obtained by fraudulent misrepresentations where the instrument is consciously executed knowing it to be a release and one obtained by trickery such that the signer has no knowledge of the contents of the paper he has signed. It is contended that the latter may be pleaded in bar of an action at law but that the former can be set aside only in a court of equity. Cases may be found supporting this distinction. See Heck c. Missouri Pac. Ry. Co., 147 Fed. 775; Hill v. Northern Pacific Ry. Co., 104 Fed. 754; Vandervelden v. Chicago & N. W. Ry. Co., 61 Fed. 54; Hoad v. New York Central R. R. Co., 6 Fed. Supp. 565. A long list of them may be found in the opinion of Lowell, J., in the case of Pringle v. Storrow, 9 Fed. (2d) 464.

A very exhaustive discussion of the point may be found in the case of Wagner v. National Life Ins. Co. of Montpelier, Vt., 90 Fed. 395, and the Court composed of Taft and Lurton, Circuit Judges, and Clark, District Judge, reached the conclusion that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing execution, where the issue involves simply a question of fraud between the parties. However, it is noted that the release in issue in that case was not under seal.

While it is true that fraud often furnishes ground for equitable relief, it more often creates an issue of fact peculiarly for a jury in actions at law. There seems to be no logical reason for submitting to the jury issues of fraud in ordinary actions of contract and denying to submit the issue in an action involving a release which is no more than a form of contract. Carey v. McMillan, 289 Fed. 380, 387.

The courts in this jurisdiction, in more recent cases, both federal and state, have made no such distinction, but when a [fol. 77] question of fraud has been raised in a replication to a simple release, not under seal, pleaded in bar, the entire issue has been submitted to a jury in a single trial in a court of law. Insurance Co. v. Bailey, 13 Wall. 616; Cable v. U. S. Life Ins. Co., 191 U. S. 288; Kansas City Southern Ry. Co. v. Martin, 262 Fed. 241; Southern Ry. Co. v. Clark, 233 Fed. 900; Columbia-Knickerbocker Trust Co. v. Abbott, 247 Fed. 833; Plews v. Burrage, 274 Fed. 881; Suravitz v. Pristasz, 201 Fed. 335; American Sign Co. v. Electro-Lens Sign Co., 211 Fed. 196. The last mentioned case contains an extended discussion of the point.

We hold that the plaintiff cannot be deprived of his right to a jury trial upon any such narrow grounds as what now appears to be a fast disappearing distinction between a release obtained by fraudulent misrepresentations and one obtained by fraud in its execution.

No reason is suggested why a release obtained by duress should receive more favorable consideration than one obtained by fraud. In fact if it were a moral question the odds would be in favor of the latter. It has been held that the same principles of law apply. Fairbanks v. Snow, 145 Mass. 153.

The defendant's plea alleges that the release is under seal and it is argued that therefore it can be set aside only by a separate action in equity. If this is so, it follows that the order of the district court transferring the case from law to equity must be sustained.

An examination of the release discloses that there is no seal set opposite the signature of the plaintiff. Five signatures appear with only one seal which is set opposite the name of the General Electric Company. It is alleged in defendant's motion to transfer the case to equity that, "said release was under seal in that the plaintiff adopted the seal of the other parties who signed the release." Whether the adoption of a seal affixed by another person [fol. 78] is a question to be determined by extraneous evidence when there is nothing in the final wording of the instrument indicating that the parties, "have hereunto set their hand and seal" raises a rather delicate question but one which we do not find it necessary to determine. See Hudson v. Webber, 104 Me. 429 Barnet v. Abbott, 53 Vt. 120; State v. Humbird, 54 Md. 327; Jacksonville, etc., Ry. v. Hooper, 160 U. S. 514-19. It is quite evident that the judge of the district court treated the release as under seal. No question to the contrary appears to have been raised before him by plaintiff's counsel. We do not think the question should be raised for the first time in this court. It well might have been considered that the plaintiff adopted the seal that was affixed to the release. C. F. Starita Co. v. Compagnie Havraise Peninsulaire, 52 Fed. (2d) 58; Cammack v. Slattery & Bros., Inc., 241 N. Y. 39; Tasker v. Bartlett, 5 Cush. 359.

Treating the release as a document under seal, it does not necessarily follow that the plaintiff should be deprived of his right to a trial by jury when the nature of the present action is considered. Neither does it follow that an order transferring the case from law to equity against the protest of the plaintiff can be sustained when no affirmative equitable relief is sought.

We are cognizant of the fact that following the lead of the Supreme Court in Hartshorn v. Day, 19 How. 211, (1856), and George v. Tate, 102 U. S. 564, (1880), various lower federal courts have maintained a distinction between a simple contract not under seal and a specialty holding to the ancient doctrine that a sealed instrument can be set

aside for fraud only in a court of equity. The Hartshorn case, because of its complications, was clearly a case for a court of equity. The George case, was tried before a jury but evidence of fraud was ruled out, and the ruling sustained by the Supreme Court. We find no suggestion that the procedure followed in that case was improper.

[fol. 79] After citing the above mentioned cases defendant cites to the point, that a sealed instrument cannot be set aside except in equity, three cases in none of which a sealed instrument was involved. Union Pacific R. Co. v. Syas, 246 Fed. 561; Cavender v. Virginia Bridge & Iron Co., 257 Fed. 877; Penn R. R. Co. v. Hammond, 7 Fed. (2d) 1010. It is rather significant that the industry of counsel has failed to cite for our examination a single Supreme Court case reaffirming the principle laid down in George v. Tate, supra.

While 274b of the Judicial Code permits the filing of equitable defenses in an action at law, it does not change legal defenses into equitable defenses. Although defendant's answer may be filed as an equitable defense, it does not follow that it is such. It must be considered as though the allegations of the answer and replication were set forth in an independent suit in equity. Liberty Oil Co. v. Condon Bank, 260 U. S. 235; People of Porto Rico v. Livingston, 47 Fed. (2d) 712.

"In view of the decisions above referred to, we are unable to agree that in all cases in which no affirmative equitable relief is sought by either plaintiff or defendant, that one who signs a release, does, by the mere act of affixing a seal thereto, necessarily convert a legal into an equitable defense thereby depriving himself of his constitutional rights to a trial by jury if it later appears that the transaction was conceived in fraud or was the result of duress. Cases involving the reformation or rescission of written contracts which by reason of mistake fail to express the intention of the parties of which McIssac v. McMurray, 77 N. H. 466, is an illustration should be carefully distinguished.

While it may not appear that the case of George v. Tate, has been expressly overruled it appears to have been questioned and sometimes disregarded. Am. Mills Co. v. Am. Surety Co., 260 U. S. 360; Manchester St. Ry. v. Barrett, [fol. 80] 265 Fed. 557; Plews v. Burrage, supra; Nat. Aniline & Chemical Co. v. Arnhold, 298 Fed. 755.

Union Pacific Railway v. Harris, 158 U. S. 326, has been cited by some of the lower federal courts as sustaining the case of George v. Tate, but we find nothing in it that indicates that such was the intention of the Supreme Court, and it seems rather significant that no mention of the George case is found in the opinion and that a large number of cases decided in various state Supreme Courts are referred to.

Assuming, but not determining as a matter of law, that the district court correctly held that the release is under seal by adoption, and assuming that the distinction between fraudulent misrepresentations and fraud in the execution of a sealed instrument still exists according to the greater weight of authority, the former as an equitable defense, the latter as a defense at law, we are still of the opinion that the assumptions cannot avail the defendant in this action.

The plaintiff's declarations set up as a cause of action a contract made in violation of the anti-trust laws,—a contract which is declared by a statute to be illegal. Whether plaintiff can establish his claim is of no consequence in the determination of the present issue. Duress is a ground upon which the plaintiff seeks to avoid the consequences of his own act in entering into an illegal agreement.

Conceding that in ordinary cases an instrument executed under duress is voidable not void (Duignan v. U. S., 274 U. S. 195; Robinson & Co. v. Belt, 187 U. S. 41; Southern Cotton Oil Co. v. Shelton, 220 Fed. 247), this cannot be so if the effect would be to give life and substance to an illegal contract.

In the case before us the release alleged to have been signed under duress enters into and forms an integral part of an agreement alleged to be illegal because establishing a monopoly in restraint of interstate trade. If the agreement is void the release is void and requires no court of [fol. 81] equity to so declare it. The primary issue is the validity or invalidity of the contract. A distinction is still made in cases following George v. Tate between instruments void and those voidable. A release obtained by trickery is treated in an action at law as if it were never made. It will admit of a replication or plea of non est factum. So also, a release, even though under seal, is void not voidable when, if given effect, it would result in affirming a contract de-

cleared illegal by statute. As a matter of pleading such a release, filed as an answer in a suit at law, will admit of a replication setting out that the release is void. The principle that invalidity of a sealed contract may be set up as a defense in an action at law is not of modern origin. It dates back to the time of Coke's reports. In Whelpdale's case, found in Coke's Rep. Vol. 3, Page 241, it is held that infancy and duress are defenses in an action at law under a plea of non est factum, while deeds void by act of Parliament require a special plea setting out the grounds of invalidity and ending "and so the said deed is void."

In the case of Maine Northwestern Development Co. v. Northern Commercial Co., 213 Fed. 103, it is held that fraud inducing the execution of a contract which is of such a nature as to render it against public policy or illegal is available as a defense in an action on a contract at law. Judge Neterer says: "It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements which the other would abhor. Both are established to promote the well-being of society and this may not be promoted by encouraging the violation of the most sacred duties known to the law." See Continental Wall Paper Co. v. Voight, 212 U. S. 226, 261.

It is impossible to harmonize the conflicting decisions of the district courts or even those of the circuit courts of ap- [fol. 82] peal. Each seems to follow its own line of decisions.

We hold that the validity of the contract is the primary issue to be tried and that it raises a mixed question of law and fact entitling the plaintiff to a trial by jury. The order transfering the action at law to equity filed November 8, 1932, cannot be sustained.

Only one more question requires attention for a final disposition of the case, insofar as the issues now before us.

After the case had been transferred to equity the plaintiff moved the court to frame issues to be submitted to a jury, and it may be suggested that he thereby waived his right of trial by jury in an action at law.

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. Basey v. Gallagher, 20 Wall. 670; Quinby v. Conlan, 104 U. S. 420.

Framing issues for a jury in action in equity does not meet or secure the right to trial by jury as guaranteed by the Seventh Amendment. In the case of Cates v. Allen, 149 U. S. 451, Chief Justice Fuller uses the following language: "As the ascertainment of complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the Seventh Amendment." See also New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Company, 190 Fed. 861, 869.

In view of the fact that the plaintiff immediately filed a bill of exceptions to the order of transfer which was allowed November 9, 1932, and has consistently claimed throughout the course of proceedings in equity that it is entitled to a jury trial, we hold that it has not waived its right by its motion to frame issues to be tried by jury after the case was transferred to equity. See American Surety Company v. American Mills Co., supra; Hollins v. Briarfield Coal & Iron Company, 150 U. S. 371, 380.

[fol. 83] The several orders and decrees of the District Court are vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant to have costs in this court.

Morton, J., concurs in the result.

[fols. 84 & 85] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY

On October 30, 1934, this cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit, on the eighth day of April, A. D. 1935, the opinion of the court (page 69) was filed and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—April 8, 1935

This cause came on to be heard October 30, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 8, 1935, here ordered, adjudged and decreed as follows: The several orders and decrees of the District Court are vacated and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellant to have costs in this court.

By the Court:

Arthur I. Charron, Clerk.

RECITAL AS TO ORDERS

Thereafter, to wit, on April 23, 1935, a petition for rehearing was filed by appellee, which was denied by order of court on May 3, 1935.

Thereafter, to wit, on May 9, 1935, mandate was stayed until further order to court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 39,681. U. S. Circuit Court of Appeals, First Circuit. Term No. 127. Radio Corporation of America, Petitioner, vs. Raytheon Manufacturing Company. Petition for a writ of certiorari and exhibit thereto. Filed June 14, 1935. Term No. 127 O. T. 1935.